REGISTERED No. D. 221

The Gazette of India

EXTRAORDINARY

PART II—Section 3—Sub-section (ii)

PUBLISHED BY AUTHORITY

No. 211] NEW DELHI, TUESDAY, OCTOBER 14, 1958/ASVINA 22, 1880

ELECTION COMMISSION, INDIA

NOTIFICATION

Delhi, the 3rd October, 1958/*Asvina* 11, 1880, (*Saka*)

S.O. 2187.—Whereas the election of Shrimati Shivrajwati Nehru as a member of the House of the People from the Lucknow District (Central) constituency, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951, (43 of 1951), by Shri Triloki Singh son of M Gokaran Dayal Singh, resident of Ghasiyarimandi, Lucknow,

And whereas the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act, for the trial of the said election petition, has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order in the said election petition to the Commission

Now, therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal

BEFORE THE ELECTION TRIBUNAL (DISTRICT JUDGE'S COURT) LUCKNOW

PRESENT:

The Hon'ble Mr Justice Ambika Prasad Srivastava, (Judge, High Court of Judicature at Allahabad)—*Chairman.*

Sri K. C. Srivastava (Retired District Judge)—*Member.*

Sri S. N. Roy, Advocate—*Member.*

ELECTION PETITION NO. 2 OF 1955.

Sri Triloki Singh son of M Gokaran Dayal Singh, aged 46 years, resident of Ghasiyari Mandi, Lucknow—*Petitioner.*

Versus

1. Shrimati Shivrajwati Nehru, wife of late Dr. Kishan Lal Nehru, resident of Fawn Brake Avenue, Havelock Road (now known as Sarojini Naidu Marg) Lucknow.
2. Sri Atal Behari Bajpai, resident of Vinayak Bhawan, 1 A. P. Sen Road, Lucknow.
3. Sri Raj Kumar Srivastava, son of late Sri Lachhman Prasad Srivastava, Advocate, Mashakganj, Lucknow.
4. Sri Jai Dayal Awasthi, resident of Ganeshganj, Lucknow.
5. Sri Mahesh Nath Sharma c/o B Mahabir Prasad Srivastava, Advocate, Dr. B. N. Verma Road, Lucknow.
6. Sri Babu Lal Vakil, resident of Daulatganj, Lucknow—*Respondents.*

For the petitioner.—Sarvshri S. P. Sinha, H. N. Misra, Bishun Singh, Onkar Singh, H K. Ghosh and B. C Agarwal.

For the respondent No. 1—Sarvshri K. L. Misra Advocate General, Mahabir Prasad Srivastava, Umesh Chandra Srivastava and Om Prakash Srivastava

JUDGMENT

This is an election petition filed under section 81 of the Representation of the People Act. On the 27th of February, 1955, a bye-election was held for the Lucknow District (Central Constituency) of the Lok Sabha (House of the People). The petitioner Sri Triloki Singh was one of the candidates. The other candidates were the six respondents, Smt Shivrajwati Nehru, Sri Atal Behari Bajpai, Sri Raj Kumar Srivastava, Sri Jai Dayal Awasthi, Sri Mahesh Nath Sharma and Sri Babu Lal. The petitioner was a candidate on behalf of the Praja Socialist party. Smt. Shivrajwari Nehru, respondent No. 1 represented the Congress, Sri Atal Behari Bajpai, respondent No. 2 was a representative of the Jan Sangh. The other four candidates, respondents Nos. 3 to 6 had withdrawn from the election within the prescribed time. The contest, therefore, was between the petitioner and the respondents Nos. 1 & 2. There were 398 polling stations at seventy different places in the Constituency. Polling was held on the 27th February, 1955. Counting took place on 1st March, 1955, and the result was declared at 9 P.M. on that very date. Sri S. N. M. Tripathi, the District Magistrate of Lucknow was the Returning Officer. According to the final declaration which he made, Smt. Shivrajwati Nehru had received 49, 354 votes, Sri Triloki Singh had received 34,578 votes and Sri Atal Behari Bajpai had received 33,986 votes. Smt. Shivrajwati Nehru, respondent No. 1 was therefore, duly declared elected and a notification to that effect was published in the Gazette of India, Extra-ordinary on March 5, 1955. The present election petition was filed by Sri Triloki Singh before the Election Commission India, New Delhi, on March 21, 1955. This Tribunal has been constituted by the Election Commission for the trial of the petition (*vide* notification No. 82/2/55/5182, dated 1th May, 1955), which calls in question the election of the respondent No. 1 to the seat of the Lok Sabha.

The petitioner alleges that he was a candidate for one of the seats to the Lok Sabha from the Lucknow District in the General Elections of 1952 also. At that time too Sri S. N. M. Tripathi was the Returning Officer. In connection with that election the petitioner had made a complaint against Sri S. N. M. Tripathi and certain other officials alleging that Shri Tripathi had identified himself with the Congress candidate and had acted in a spirit of partisanship. The petitioner had lost that election and had filed an election petition (No. 320 of 1952) in which too he had made a grievance in respect of the conduct of Sri S. N. M. Tripathi. On that account he was afraid that S. N. M. Tripathi would not act fairly as Returning Officer of the Bye-Election in dispute too, but he did not raise any objection to his appointment as Returning Officer in respect of this Bye-Election because he thought that Sri Tripathi must have become wiser by experience and that if the rules were scrupulously followed the election was sure to be a free and fair one in spite of any personal inclinations of Sri Tripathi. The petitioner, however, found that in this bye-election too from the very beginning Sri S. N. M. Tripathi acted throughout in pursuance of a scheme or purpose the aim of which was to manipulate matters in such a manner that the Congress candidate should be declared elected even though she did not have the support of the majority of the electorate. The contention of the petitioner is that for the fulfilment of the scheme which Sri Tripathi and preconceived, he contravened the various provisions of the Representation of the People Act and the rules framed thereunder. At the time of the counting of the ballot papers and the declaration of the result, to facilitate his purpose, the Returning Officer threw a veil of secrecy over everything which was being done in the counting room and did not permit the petitioner or the other candidates or their agents, who were present in the room, to have any knowledge about the figures of the counting as it was proceeding. All this was done inspite of the protests of the petitioner and his counting agent.

The acts and commissions of the Returning Officer of which the petitioner particularly complains are:-

1. Though the petitioner and his counting agent were allowed to be physically present in the Counting-room, them right to watch and supervise the counting of votes was defeated because they were not allowed to know what was going on at the time of counting and the relevant information was deliberately withheld from them.

2. Counting was held candidate-wise though under the rules it ought to have been held polling-station-wise. This was a contravention of rule 46(1) of the Representation of the People (Conduct of Elections and election Petitions) Rules.

3. Rule 16(1)(vi) of the Representation of the People (Conduct of Elections and Election Petitions) Rules was broken in as much as the counting of the ballot papers was not recorded in Form 14 forthwith and the candidates or their agents were not allowed to look at them. The ballot papers were also not kept in separate sealed covers after counting as required by the rules.

4. The petitioner or his agent were not allowed to know the result of the counting of the ballot papers found in each ballot box before the Returning Officer wrote or dictated the figures to his clerical staff.

5 The counting was carried on even in the absence of the Returning Officer from the counting room, in contravention of the proviso to Section 22 of the Representation of the People Act

6 When counting was stopped for about 45 minutes for lunch, the ballot papers and other documents relating to the election were not sealed as was required by the rules

7. Form No 14 was not filled in or prepared as the counting went on as it ought to have been done.

8 Form No 10 was opened at a wrong time After the ballot papers had been counted they were not kept in separate packets so as to indicate the name of the candidate from whose ballot box the ballot papers had been taken out The ballot papers of each candidate were not sealed before commencement of the counting of the votes of the next candidate

9 The petitioner or his agent was not allowed an inspection of the totals and their request to check the result was refused

10. After the counting and before the declaration of the result the Returning Officer and other officials left the counting room and returned after holding a short conference They again retired and returned It was only after that that the result was announced

11. The announcement of the result was in contravention of Rules 18 and 50 The result was that the petitioner was deprived of his right to claim total or partial recounting of votes

12 After the result announced the petitioner's request for sealing the ballot papers and other documents connected with the election was wrongfully refused

According to the petitioner these irregularities and illegalities have materially affected the result of the election

The petitioner further contends that for the furtherance of the prospects of her election the respondent No 1, her agents and workers obtained and procured the assistance of persons serving under the Government of the State of Uttar Pradesh He points out, in particular, that the Ministers of the U P Government including Sri Sampuranand, the Chief Minister, Sri C B Gupta, Sri Hafiz Mohammad Ibrahim, Sri Syed Ali Zaheer, Sri Girdhari Lal and Sri Hargovind Singh, not only canvassed for the respondent No 1 but abused their position as Ministers by issuing appeals and employing Government servants for the propagation and circulation of such appeals They even coerced people to vote for her They used staff cars driven by chauffeurs employed by the State in their campaign of canvassing Sri Hafiz Mohammad Ibrahim, the Minister for Finance and Power issued a statement for the press appealing to the voters to cast their votes in favour of respondent No 1 He took the assistance of his Personal Assistant Sri Krishna, a person serving under the State, for getting the statement typed, for attesting it and for issuing it to the press, All this according to the petitioner fell under Section 123 (8) of the Representation of the People Act 1951, and on account of it the election of respondent No 1 was void under Section 100 (2) (c) of the Act

The case of the petitioner is that the polling had mostly been in his favour and every one expected that he would win It is also alleged that even the respondent No 1 and her workers and agents at one stage had given up all hopes and conceded that she had lost The result which was announced was thus, contrary to all expectations It could not therefore be the result of the actual polling and was the out come of official manipulation As everything had been done in pursuance of a preconceived scheme or purpose the election of respondent No 1 was in fact no election at all The petitioner, therefore, claims that he is entitled to have it set aside and declared void

Respondents Nos 2 and 3 to 5 did not put in any appearance in the case and the petition proceeded *ex parte* against them The respondent No 6 filed a written statement in which he pleaded ignorance about most of the allegations made by the petitioner He did not thereafter contest the petition or put in any appearance and for all practical purposes the case proceeded *ex parte* against him also

The petition is contested only by the respondent No 1 She admits that she was one of the seven candidates who had been duly nominated for the seat and that as the respondents No 3 to 6 had withdrawn from the contest she along with the petitioner and the respondent No 2 were the only contestants for the seat She also admits that Sri S N M Tripathi was the Returning Officer of the Bye Election She claims that she was duly elected as she had secured several thousand votes more than the petitioner and the respondent No 2 She does not dispute the figures of the votes mentioned in para 16 of the petition She vehemently denies that there was any preconceived scheme or purpose according to which the Returning Officer worked and also denies that any rules were

deliberately broken She says that the election was a free and fair one and that she was declared elected because she had received the support of the majority of the electors She admits that the counting of votes was done candidate-wise and not polling station wise but contends that that did not amount to a breach of the rules It was done because it was the only method which could eradicate all chances of the mixing up of the ballot papers of different candidates and also saved time She also contends that counting was done candidate wise with the consent of the petitioner and the other candidates She denies that at any stage any protest was made in that connection She also denies that any veil of secrecy was thrown over the proceedings in the counting room She pleads that every thing was done in an above board manner All the candidates and their agents had been given seats in the counting room and were allowed to see everything and to hear everything Nothing was kept secret from them The Returning Officer had expressely offered to supply any figures relating to the counting of votes when asked for According to the respondent counting was done according to rules and forms were prepared properly at the required time and after counting the ballot papers were kept in sealed covers The respondent denies that any secret consultations were held before the result was announced or that there was any manipulation of votes She admits that no sealing was done during the lunch interval but submits that it was not necessary for the safe custody of the boxes and documents relating to the election She also says that the ballot papers were wrapped up box wise in checking slips and then tied up with string and put in ballot boxes which bore the labels and the names of the candidates to whom the ballot papers related The result was announced in the presence of all the parties and even during course of the counting the petitioner and the other candidates and their agents could hear what was being dictated by the officer assisting the Returning Officer to the clerks who were filling in Form No 14 She emphatically repudiates the suggestion that the Returning Officer rendered any assistance to her in securing her election and urges that his attitude towards all the candidates was throughout uniform, impartial and fair

She admits that the Ministers mentioned in list D of the petition canvassed for her because she was a candidate set up their party but contends that in doing so they did not do any thing contrary to law She denies that they abused their position or that they coerced people to vote for her She also denies that they used staff cars driven by chauffeurs employed by the State In respect of Sri Hafiz Mohammad Ibrahim, the Minister for Finance and Power, she admits that he issued a statement for the press mentioned in list B of the Petition which was attested by his P A Sri Sri Krishna and was issued to the press but says that this did not amount to assistance by the Personal Assistant in furtherence of the prospects of her election and could not fall within the ambit of Section 123 (8) of the Representation of the People Act in any manner She thus, denies that any assistance of the servants of the State was obtained or procured by her or her agents which could affect her election in any way

She denies that the result which was declared was in any way contrary to expectations or that she at any stage had given up hopes or had declared that she had lost She says that on the contrary her success at the election was a foregone conclusion as she commanded the confidence of the majority of the voters She denies that the result declared was not the real result of the polling

She pleads in the alternative that even if it was found that there was any deviation from the strict compliance with any provisions of the Act and the Rules relating to the counting of ballot papers, the result of the election had not at all been affected thereby and there can, therefore, be no question of the election being set aside on that account

On these pleadings, the following issues were framed for trial:—

1. (a) Did the Returning Officer fail to comply with the provisions of the Representation of the People Act and the Rules framed thereunder in respect of the following matters?

(i) He did not comply with Section 64 of the Representation of the People Act

(ii) He denied to the petitioner the right to watch and supervise the counting of votes himself or through his counting agents

(iii) He did not inform the petitioner or his agents about what was going on at the time of counting and withheld relevant information from them

(iv) He did not comply with Rules 46 (1) (vi) and (2) 48 and 50 of the Representation of the People (Conduct of elections and election petitions) Rules

(v) He did not coply with the directions contained at serial No 1 of Part B of the Directions and Instructions issued by the Election Commission India and of the directions contained in Chapter X of the Handbook issued by the Election Commission India for candidates for election

(vi) He did not comply with Rule 17 A of the Instructions regarding counting of votes by the U P Government Was he bound to comply with that rule?

(b) Did these breaches materially affect the result of the election and render it void?

(c) Were the acts and omissions of the Returning Officer detailed in the list given by the petitioner (Paper No 52C) committed by him and were they part of a scheme intended to help the respondent No 1 in the election?

Did such acts or omissions materially affect the result of the election? Can the election be questioned on the ground of such acts and omissions on the ground that they formed part of such a scheme?

2 (a) Did the Returning Officer commit any non compliance with the provisions of the Representation of the People Act or the Rules framed thereunder by counting the votes candidate wise and not polling station wise?

(b) Was the counting done candidate wise with the express or implied consent of the petitioner? If so could such consent validate that counting if it was otherwise invalid?

(c) Has the candidate wise counting materially affected the result of the election? If so has it become void on that account?

3 Did the represent No 1 her agents or workers procure assistance from servants of the U P State as mentioned in lists B and D in connection with the election? If so, does it amount to a major corrupt practice? Is the election void on that account?

4 Did the Ministers mentioned in list D abuse their position by (a) employing Government servants, (b) using state cars drivers by chauffeurs employed by the State, (c) canvassing voters and (d) coercing voters, for giving their votes to the respondent No 1 as alleged? If so did such conduct amount to a major corrupt practice and vitiate the election?

5 Did the Returning Officer render illegal assistance to the respondent No 1 in securing her election? If so did such act amount to a corrupt practice major or minor? If it amounted to a minor corrupt practice, has it materially affected the result of the election?

6 Is the petitioner entitled to get the election declared void?

FINDINGS

Issue No 1 (*a*) (*i*), 1 (*a*) (*ii*) *and* 1 (*a*) (*iii*)—It would be convenient to deal with these sub issues together

In order to appreciate the contentions pressed in these respects on behalf of the petitioner it is necessary to have before us a picture of how the counting was done in the counting room The official version is that this Counting room was the Court room of the City Magistrate Lucknow The room itself was divided in two portions In one portion there was a dais which was separated from the rest of the room by a wooden railing The rest of the room was divided into three parts There was the middle portion which was separated from the two wings on its either side by two wooden railing There were 15 tables, 8 in one wing and 7 in the other These tables were known as counting tables At each table there were three counting clerks 2 checking clerks and one Gazetted Officer In the middle portion there were chairs where the candidates and their agents could sit They could also stand near the railing which divided the portion of the room which contained the dais from the rest of it, and watch what was taking place on the dais On the dais there was a big table In the centre of it sat the Returning Officer Next to him on the right was the chair of the Assistant Returning Officer On his left there was the chair of Shri Farhat Ali, Dy Magistrate On one side of the table was sitting Shri Tadli Mohan, a clerk Between him and Sri Farhat Ali there was the chair of another clerk who was not sitting actually at the table but at some distance from it On the other side of the table were sitting Sri Nigam, Sri Malik and one other Gazetted Officer Ballot boxes had originally been arranged Polling station *cum* candidate wise in the room adjacent to the counting room The candidates and their Agents examined the ballot boxes there and checked their outer seals Before the counting began Section 128 of the Representation of the People Act was read out Then from the adjacent room the ballot boxes of one candidate at a time were brought to the counting tables. The outer seals of the boxes were broken there and the candidates and their agents examined the outer labels as well as the paper seals Then the boxes were opened and the ballot papers were taken out Then the ballot papers were arranged in bundles They were counted by the counting clerks Then they were checked by the checking clerks The ballot papers liable to be rejected were separated The numbers of the rejectable and valid ballot papers were then entered in check slips The check slips were signed by the Officers sitting at the counting tables The bundles wrapped in check slips and then tied with a string were then brought to the big table on the dais The ballot papers were then taken out of their wrappings If there were any rejectable ballot papers they were shown to the candidates and their agents and the Returning Officer decided whether they were really rejectable In that case he rejected them and put them aside. The valid ballot papers and the

check slips were then passed on to Sri Farhat Ali who was sitting on the left of the Returning Officer. He dictated the figures entered in the check slips to Sri Ladli Mohan Clerk who was sitting just near him, and Sri Ladli Mohan entered them in Form 14. The ballot papers were then again wrapped up, by the other clerk, who was sitting by the side of Sri Ladli Mohan who in his turn put it in an empty ballot box. After one page of Form 14 had been filled in so far as one candidate was concerned, it was passed on to Mr. Nigam Addl. District Magistrate (Judicial) who was sitting to the right of the Returning Officer, to be totalled by him. After totalling the figures Sri Nigam passed that page of Form 14 on again to the Returning Officer who either kept it with himself or passed it on through Sri Farhat Ali to the clerk who was filling it in. The Daftari who was sitting behind the Returning Officer then sealed the ballot box as soon as it was full. After the counting of all the votes of one candidate was over all the figures entered in Form 14 in respect of him were totalled. Then the counting of another candidate began. The same procedure was followed with respect to him. After the counting of the votes of all the candidates had been done and all the figures entered in Form 14 had been totalled, Form 16 was prepared. The result was then declared.

The contention of the petitioner in this connection is two fold. He says in the first place that though under Sec. 64 of the Representation of the People Act he as well as his counting agent had a right to be present in the Counting Room to watch and supervise the proceedings that were taking place in that room. The Returning Officer practically deprived him of that right by not permitting him to watch the counting at the counting tables or to take figures from there by not allowing him to note the results of the counting as it went on, by not showing him the figures which were being taken down and by not permitting him to inspect the totals or to check the results. He says that a sort of veil of secrecy or iron curtain was thrown over the entire proceedings and the Returning Officer sought justification for it in Section 128 of the Representation of the People Act. In the beginning for sometimes Sri Farhat Ali dictated the figures that were to be entered in Form 14 in a tone loud enough to be heard by the candidates and their agents. The figures were being noted by them. Then the Asstt. Returning Officer took exception to their noting down the figures and said that it violated the rule of secrecy. The petitioner and his agents protested. A reference was made to the Returning Officer and the Asstt. Returning Officer announced that his view had been upheld by the Returning Officer too. After that Sri Farhat Ali lowered the tone of his dictation with the result that the figures he was dictating could not be heard by the candidates or their agents. They were then forced to stop taking notes. The petitioner also contends that Form 14 was not being filled in as it ought to have been filled in. What the Returning Officer or the Asstt. Returning Officer wrote was written by him in such a way that the petitioner or his counting agent could not see what was being written.

The second contention of the petitioner is that as required by rule 16(1)(viii) and (ix) of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951 (which will hereinafter be referred to in this judgment as the Rules) the ballot papers were not put in separate packets and the packets were not put in separate containers. Packet slips were not used at all. The bundles of ballot papers were really heaped on the dais below the tables and were not sealed at any stage. Even after the result had been declared, the petitioner prayed that he might be allowed to put his own seal on all the ballot papers and the documents connected with the election. He was not allowed to do so.

So far as the first contention is concerned the respondent denies that any veil of secrecy was thrown over the proceedings. She contends that everything was being done openly. The candidates or their agents were not being allowed to take the figures from the counting tables because the figures were not final. The final authority for deciding the question of rejectability of the ballot papers was the Returning Officer and till he had decided the question no one could be certain as to how many valid ballot papers had been found in a ballot box. At the table on the dais the figures were being dictated by Sri Farhat Ali in a tone loud enough to be heard by all the candidates and their agents. Except for its natural fluctuation the tone of dictation was never deliberately lowered. No one was prohibited from taking notes. The only thing said was that if any figures were noted the Returning Officer would not be responsible for their correctness. The Returning Officer had expressly offered to give authentic figures to any candidate or his agent whenever required. The offer was however, never availed of. Under the rules the Returning Officer was not required to declare the total number of valid and invalid votes received by a candidate at a particular polling Station. According to the respondent Form 14 was prepared in a proper manner as the counting went on. The petitioner never wanted to check the totals. There was therefore, no question of his being forbidden to do so.

In respect of the latter contention the respondent's case is that though the bundles of ballot papers were not put in separate packets they were put in empty ballot boxes of the candidates to whom they related and those boxes were duly sealed. They were not kept in heaps under the table of the dais. The petitioner's request after the declaration of the result that he be allowed to seal all the papers was rejected because that could not be done in the absence of the Returning Officer and the other candidates or their agents.

Under Section 64 of the Representation of the People Act "At every election where a poll is taken, votes shall be counted by, or under the supervision of the Returning Officer, and each candidate, his election agent and his counting agent, shall have a right to be present at the time of counting". Under rule 45 of the Rules the persons mentioned in Section 64 of the Representation of the People Act are to be allowed to be present at the counting of votes. In England certain facilities are to be given to the counting agents. According to the paragraph 28 of the Final Report of the Committee on Electoral Law Return quoted by Schofield in his book of Parliamentary Elections, second edition, page 367:—

> 'As regards facilities which should be awarded to the counting agents, two points of view have been presented to us The candidates and through them the electors have a right to be satisfied that the count is properly and fairly conducted. For this purpose, candidates must be allowed to appoint a reasonable number of counting agents The latter should not merely be admitted to the room in which the count takes place but should be given adequate facilities to oversee the count and to make sure that there is no irregularity, though they should not be allowed to handle the ballot papers without the permission of the Returning Officer or in any other way to obstruct the count."

This appears to have found recognition in Rule 45 clause (iii) of the Parliamentary Election Rules which are given in the II Schedule of the English Representation of the People Act of 1949. That clause provides that the Returning Officer shall "give the counting agents all such reasonable facilities for overseeing the proceedings and all such information with respect thereof, as he can give them consistently with the orderly conduct of the proceedings and the discharge of his duties in connection therewith". In our Rules there is no express provision corresponding to Rule 45 (iii) quoted above but that cannot obviously justify the inference that the facilities which are bound to be provided in England to a counting agent are to be withheld in this country The right of a candidate or his counting agent to watch the proceedings and to see that the counting is done fairly and in an above-board manner appears to have been too obvious to need specific mention. That is why no express rule appears to have been framed about it in India It appears to have been taken for granted that every Returning Officer would grant these facilities to all concerned. In the Chingleput case (Hammonds Election Cases page 305) a question was raised as to whether a candidate was entitled to see that each vote was counted one by one by the Returning Officer himself whether each vote was to be shown to the candidates before it was counted or rejected and whether they were to be allowed to raise objections if they had any. It was observed that that could not be the intention of the regulations and that "all that was intended was that the candidate and his agent should have a general opportunity to see for himself that the counting and the rejection were proceeding on the right line and check them himself from time to time to satisfy himself that the proper principles were being followed". In the Hand Book issued by the Election Commission of India for candidate for election to the House of the People etc printed and published by the S.G.P. at the Government Central Press, Trivandrum, 1951, at page 23 there is a direction that the candidates and their agents should keep a record for their own information of the result of counting of each box. We have therefore, no doubt that the petitioner is right in his claim that he along with his counting agent was not only entitled to be physically present in the counting room but was also entitled to watch the proceedings and to see for himself that the counting was being done strictly according to the rules, in a fair and proper manner. He was also entitled to note how the counting was proceeding and what the position of the various candidates was in respect of voting at a particular stage or at a particular polling Station.

Section 128 of the Representation of the People Act requires "Every Officer, Clerk, Agent or other persons who performs any duty in connection with the recording or counting of votes at an election shall maintain and aid in maintaining the secrecy of voting and shall not, (except for some purpose, authorised by or under any law) communicate to any person any information calculated to violate such secrecy". Both the parties are agreed about the interpretation, that is to be put on this provision The only thing which it requires is that there should be no disclosure as to how a particular elector had voted at a particular election. It lays down nothing more and nothing less. This provision, could not, therefore, be used as an excuse for throwing a veil of secrecy over the proceedings in the counting room. Nor is it the contention of the respondent that it could be used for that purpose.

In view of the emphatic denial of the respondent that any secrecy was being observed in respect of the proceedings of counting it was for the petitioner to establish his allegation that a veil of secrecy was thrown over the entire proceedings or that an iron curtain was set up. To discharge this burden the petitioner has examined himself and two other witnesses, Sri Bhupendra Nath Srivastava, his own counting agent and Sri Nana Deshmukh, the counting agent of the Jan Sangh candidate Sri Atal Behari Bajpai. The former is

P W 21 and the latter is P W 12 In rebuttal the respondent has examined Sri S. N M Tripathi, the Returning Officer D W 11, Sri Farhat Ali D W 10, Sri K S Sinha, D W. 9, Sri Ladli Mohan D W 8 and Sri Kedar Nath Pande D W. 7

It is admitted that the petitioner or his counting agent were not allowed to obtain figures from the clerks working at the counting tables The reason put forward by the Returning Officer in this connection is that the figures which could be had from the counting table, could only be tentative figures They could not be final till the Returning Officer had himself decided whether a particular ballot paper was liable to be rejected or not This appears to us to be quite reasonable The petitioner's evidence on the point is not very consistent Sri Bhupendra Nath Srivastava says "I went to the counting table and wanted to find as to how many votes had been found in the box But the persons at the counting table refused to disclose that information No one had forbidden us from going near the counting tables The persons at the counting tables did not tell us anything about the validity or invalidity of the ballot papers" P W 12 Sri Nana Deshmukh however states as follows:—

> "We were not allowed to go to the tables of the counting clerks At first we tried to go to the Counting Clerks in order to see how they were preparing the bundles of the ballot papers and how they were counting and if possible to count the ballot papers while they were being counted by the counting clerks We were however not allowed to do anything of the kind and were asked to sit on the chairs and to see what was being done"

The inconsistency in the two versions is obvious and needs no comment.

As to what took place on the dais, it is not disputed that after the ballot papers were wrapped up in check slips and tied with string, they were sent to the table on the dais They were checked there and the Returning Officer or his assistant decided the rejectability or otherwise of all doubtful ballot papers Then they were handed over to Sri Farhat Ali who dictated the figures of valid and invalid votes to the clerk who was sitting by his side It is further agreed that for sometime the figures were being noted by the various candidates and their agents It is said, that then the Assistant Returning Officer raised an objection that that was not proper and referred to the rule of secrecy contained in Section 128 A protest was made He referred the question to the Returning Officer on the phone He than announced that the Returning Officer agreed with his view Sri Farhat Ali then began to dictate the figures in a tone so low that the figures could not be heard by the candidates or their agents and they stopped taking notes The Returning Officer as well as Sri Farhat Ali deny all this and say that the figures continued to be dictated in the same manner and tone throughout the counting The only thing which they admit is that the Returning Officer told the persons who were noting down the figures, that they would not be responsible for the correctness of the figures so noted down and if any one wanted authentic figures at any time they would be furnished to him by the Returning Officer On this point the statement of Sri Ladli Mohan is slightly different from that of the other witnesses of the respondent From what he said at first it appeared that the Returning Officer had said that he was not responsible for giving out the figures at all Sri Ladli Mohan however corrected himself and said that what the Returning Officer had said was only that he would not be responsible for the correctness of the figures noted down by the candidates and their agents of their own accord. We are however not prepared to attach any importance to the fact that the correction was made after the counsel for the respondent said something which could be interpreted as a hint by the witness

About the preparation of Form 14 and the checking of the totals, the petitioner concedes that what was being dictated by Sri Farhat Ali was being taken down by Sri Ladli Mohan for the purpose of being entered in Form 14 The petitioner and his witnesses however want to suggest that the figures were not being entered in Form 14 and so Form 14 was not being filled in while the counting was proceeding It is suggested that Form 14 was prepared some time later, shortly before the result was announced It is also said that though several times the petitioner and his counting agent wanted to check the totals and know the results of the voting in respect of particular polling stations, they were never allowed to do so These allegations too are denied by the witnesses examined by the respondent including the Returning Officer, Sri Farhat Ali, Sri Ladli Mohan and Kedar Nath Pande They say that Form 14 was being prepared as the counting proceeded The petitioner or his agent never wanted to know the figures in respect of any particular polling station They also did not want to check the totals at any time They noted the figures for some time but no one noticed whether they had stopped noting them or not The tone of dictation was never deliberately lowered

After considering the evidence produced by both the parties on the point we feel that the petitioner cannot be held to have discharged the burden that lay upon him of satisfying us that a veil of secrecy had actually been thrown over the entire proceedings or

that he was deprived of any right he had in this connection. We cannot overlook the fact that except for S. N. M Tripathi, it is not suggested on behalf of the petitioner that any of the other officers or clerks who were working in the counting room had any malice against the petitioner or any improper motive for deliberately violating the rules of fair play Even in connection with Sri S. N. M. Tripathi it has to be kept in mind that as a complaint had been made against him by the petitioner in respect of the previous general election and his conduct had also been made a ground of grievance in the previous election petition No. 320 of 1952 filed by the petitioner, Sri S. N. M. Tripathi must have become cautious and careful so as not to give a further ground of grievance to the petitioner. The other officials working in the counting room cannot be said to have been so much under the influence of Sri Tripathi as to go out of their way to crush the right of the petitioner simply to oblige him (Sri Tripathi). Then it is surprising that when the petitioner was being deprived of such an important right of his he, who had enough experience of election matters, did not make even a faint protest in writing against what was being done. He was not the only candidate who was being affected by the procedure which is alleged to have been adopted, the Congress and the Jan Sangh candidates were equally affected. The former could not know from before that she would succeed or the latter that he would lose. They too did not raise even their little finger in protest against what everyone in the counting room is said to have been doing. Though the counting agent of the Jan Sangh candidate has appeared as a witness for the petitioner, the candidate himself did not file even a written statement in this case supporting the allegations of the petitioner on this point. The petitioner admittedly noted the figures in respect of the votes cast at a number of polling strations. Then he claims to have stopped doing it. The stopping may have been due to various reasons and cannot be said to be necessarily due to the order of the Returning Officer that the figures were to be kept secret. The candidates or their agents might have stopped taking the notes because they thought that everything was proceeding all right or because they thought that noting of the figures was unnecessary. They might also have stopped taking notes because the Returning Officer told them that if they noted the figures without getting their authenticity confirmed by him he would not be responsible for the correctness of what they had noted. The figures which were to be entered in Form 14 had to be dictated to the clerk who was taking them down. The case that the tone of the dictation was deliberately lowered so that persons other than the clerk concerned who were standing a few feet away, might not hear them, sounds too fantastic to be believed. The lowering of the tone is specifically denied by Sri Farhat Ali. All the witnesses of the respondent are definite that they offered to give authentic figures whenever desired. We find no good grounds for not accepting their statements. From the fact that the offer was not availed of, we are not prepared to infer that it was never made. The candidates and their agents may not have asked for the figures at an intermediate stage because they thought it to be unnecessary or because they did not want to disturb the proceedings. Form 14 also appears to have been prepared as the counting proceeded. It is not proved that there was anything secret about it or about the totalling of its figures.

We are, therefore, not prepared to hold that any veil of secrecy was thrown over the entire proceedings or that the petitioner was deprived of any rights in that manner.

Under clause (viii) of Sub-Rule 1 of Rule 46 of the Rules after the counting of all ballot papers contained in each ballot box has been completed by the Returning Officer and an account of such ballot papers has been recorded in Form 14, the Returning Officer shall cause all such ballot papers to be kept in a separate packet on which shall be indicated such particulars as will identify the ballot box in which such ballot papers were found, the name of the candidate to whom such ballot box was allotted and the name of the polling station and the number of the polling booth if anywhere such ballot box was used. If we refer to the Instructions regarding the Counting of Votes and Declaration of Results issued by the Government of U P Legislative (Elections) Department in 1952, we shall find the form of a packet slip (page 22 Annexure VI). The columns of the packet slip appear to be in exact accordance with what is to be indicated on each separate packet which has to be prepared under clause (viii) of Sub-Rule 1 of Rule 46 of the Rules

Clause (ix) then provides:—

> "After the counting of ballot papers contained in all the ballot boxes has been completed, the Returning Officer shall cause all the packets containing the ballot papers in support of each candidate to be placed together in a separate container or containers and shall seal up all such containers and shall write on each such container the name of the candidate in support of whom the ballot papers contained in such container were cast and the name of the constituency and the date of the election to which it refers. He shall also cause all ballot papers found in the ballot boxes of each candidate but rejected by him to be kept in a separate sealed packet."

The ballot papers found in each box have thus first to be put in bundles under clause (vi). Then all the bundles relating to one particular box are to be put in a separate packet

under clause (viii) and a packet slip is to be put upon each packet Then all the packets relating to a particular candidate have to be put in a container under clause (ix) and the container is to be sealed

According to the petitioner's own witnesses bundles were prepared in respect of the ballot papers taken out of each ballot box as required by clause (vi) These bundles were wrapped up in check slips and tied with strings He however contends that these bundles were not put in separate packets as required by clause (viii) No packet slips were used at all The bundles of ballot papers wrapped in check slips were kept according to the respondent in empty ballot boxes which bore the name and symbol of the candidate to whom they related These empty ballot boxes could be considered to be containers as contemplated by clause (ix) According to the admissions of the respondent's own witnesses, therefore, a breach was committed of clause (viii) of Sub Rule (1) of Rule 46 because no separate packets were prepared and no packet slips were used The bundles wrapped in check slips and tied with strings could not be considered to be packets as contemplated by clause (viii)

The petitioner contends that the bundles of ballot papers were not put in any ballot box or container at all and were not sealed at any stage at least till the results were declared On the contrary they were allowed to lie in heaps on the dais under the table of the Returning Officer

On this point we find it difficult to accept the petitioner's case At the trial the petitioner wanted to establish that the bundles of ballot papers were not put in any ballot boxes and there was therefore no question of the containers (if the ballot boxes were to be considered as containers) being sealed as required by clause (ix) The petitioner himself said as follows—

> "It is wrong that after the counting of the votes of the Jan Sangh candidate was finished his ballot papers were kept in some empty ballot boxes of the Jan Sangh candidate It is also wrong that after the counting of the votes of Mrs Nehru had finished her ballot papers were kept in her empty ballot boxes My ballot papers were also not put in my ballot boxes after my counting was over It is wrong that the bundles of ballot papers were kept in empty ballot boxes and sealed"

Sri B N Srivastava his counting agent stated as follows—

> 'The bundles of ballot papers of each candidate which were kept on the dais after being counted were never sealed They continued to be kept in three heaps on the dais They were not sealed in our presence even after the results were announced"

He again said—

> "The bundles of ballot papers were not kept in ballot boxes in my knowledge All the bundles of ballot papers were there on the dais till after the counting was over When the Congress votes were being counted there was one heap on the dais of the bundles of ballot papers of the Jan Sangh candidate and a second heap was being formed of the bundles of the ballot papers of the Congress candidate I did not notice at the end of the counting as to how many heaps were there on the dais"

Sri Nana Desh Mukh also said that the bundles of the ballot papers were not put in the ballot boxes or sealed In making these statements the petitioner and his witnesses appear to have forgotten what was said by the petitioner in para 7(a) of his petition There it had been indirectly conceded that after the counting of the Jan Sangh and Congress votes the ballot papers of those candidates had been put in boxes and it was alleged that the petitioner had even sought permission to put his seal on the boxes In his petition filed before the Election Commission on 2nd March 1955 a copy of which is Ex 29 also the petitioner said in respect of the Returning Officer that he did not seal the boxes at the end of the counting for each candidate From this it followed that the ballot papers of each candidate had been put at the end of his counting in ballot boxes The petitioner was required in his cross-examination to explain this contradiction The only explanation he could offer was that the reference in para 7 (a) of the written statement was to his request that was made after all the votes had been counted and the result had been announced This explanation does not satisfy us at all His explanation in respect of Ex 29 is the same and is equally unsatisfactory In the circumstances we are unable to accept the contention of the petitioner that after the counting of the ballot papers the bundles were kept in heaps on the dais and were not put in empty ballot boxes of the candidate to whom they related

We are also unable to accept the contention that the ballot boxes were not sealed at all before the results had been announced Sri K S Sinha (D W 9) Sri Ladli Mohan (D W 8) and Sri K N Pande (D W 7) witnesses for the respondent are all unanimous

that the ballot boxes in which the bundles of the ballot papers were kept were being sealed as they were being filled up. When the ballot boxes came to us they were wrapped in paper and duly sealed. There is no evidence to show that the wrapping and sealing was done after the results had been announced.

A grievance has also been made of the fact that an hour and a half after the results had been announced the petitioner made a request (Ex. 31) for being permitted to put his own seal on all the papers relating to the election. The Assistant Returning Officer did not grant the permission but referred the matter to the Returning Officer who rejected the application on the next day on the ground that the request of the petitioner could not be granted under the Rules. A writ petition was filed in the Hon'ble High Court in which the same request was made but it also was rejected. No provision of the Act or the Rules has however been pointed out to us under which the Returning Officer was bound to grant the belated request of the petitioner. There is also nothing to show that anything suspicious resulted from the refusal of the request.

Answering Issue 1 (a) (i), (ii) and (iii) in the negative therefore we hold that though there was a breach of clause (viii) of Sub-Rule (1) of Rule 46 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, there was no breach of clause (ix). It is not proved in a satisfactory manner that any veil of secrecy was thrown on the proceedings in the counting room or that the petitioner had been deprived of any right or facility which he or his agent could claim in connection with the counting.

Issue 1 *(a) (iv)*.—Clause (vi) of Sub-Rule (1) of Rule 46 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, lays down:—

> "As each ballot box is opened for counting, the mark or marks made on the box or in any of its component parts or attachments and the label containing the symbol affixed inside the box shall be checked. Thereafter the ballot papers shall be taken out from the box and arranged in convenient bundles and counted with the aid of persons appointed to assist in the counting of votes. An account of the ballot papers found in each box allotted to each candidate shall be recorded in a statement in Form 14."

It is conceded on behalf of the petitioner that the first two requirements of this clause were complied with. His grievance is that the last sentence of the clause was not followed as the account of the ballot papers found in each box allotted to each candidate was not recorded in the statement in Para 11. We have already shown that the petitioner's contention that Form 14 was not prepared as the counting proceeded, is not well founded. The form was being filled in by Sri Ladli Mohan (and for some time by another clerk) at the dictation of Sri Farhat Ali as the counting proceeded. A glance at Form 14 will show that its various columns can be filled in horizontally as well as vertically. The totalling has to be done both horizontally and vertically. There is nothing in the Rules which can be said to require specifically that the Form should be filled in horizontally and could not be filled in vertically while the counting was going on. When the number of ballot papers found in each ballot box allotted to each candidate was entered in Form 14 after they had been counted, it must be held that this requirement of clause (vi) was also fulfilled. A suggestion was made on behalf of the petitioner that Form 14 was not filled in at all till all the votes of all the candidates had been counted and that the figures which were being written at the dictation of Sri Farhat Ali were being written on some other piece of paper and were at some subsequent stage entered in Form 14. No definite evidence has however been produced by the petitioner to substantiate this suggestion. It is to be noted that no protest was made at any stage of the counting by any of the three candidates or their agents that Form 14 was not being prepared while the counting was proceeding. This grievance is also not to be found in the telegram sent by the petitioner to the Election Commission (Ex. 28) or in the subsequent letter sent there on 2nd March, 1955 (Ex. 29) or even in the application filed by the petitioner before the Returning Officer soon after the declaration of the result (Ex. 31).

Clause (2) of Rule 46 of the Representation of the People (Conduct of Elections and Election Petitions) Rules provides:—

> "The Returning Officer shall as far as practicable proceed continuously with the counting of the votes and shall during any intervals when the counting has to be suspended, keep the ballot papers, packets and other documents relating to the election sealed with his own seal and the seals of such candidates or election or counting agents as may desire to affix their seals and shall cause adequate precautions to be taken for their safe custody."

The corresponding Rule in England requires that during the excluded time the Returning Officer should place the ballot papers and other documents relating to the election under his own seal and the seal of such of the counting agents as desire to affix their seals and otherwise to take proper precautions for the security of the papers and documents (*vide* Rules 46(vi) of the Parliamentary Election Rules of England).

In the present case it is admitted that counting was suspended during the lunch interval But at that time the papers relating to the election were not sealed either by the Returning Officer or by any of the candidates The explanation of the Returning Officer is that as all the papers were in his personal custody at the time it was not necessary to seal them We are not satisfied with the explanation The omission appears to us to be entirely unjustified When Rule 46 (2) expressly required that during the lunch interval all the papers were to be kept sealed we think the rule should have been strictly complied with The rule is a wholesome one and has been framed to ensure the safe custody of all papers at a time when the attention of all the persons concerned is expected to be directed to other matters We, therefore, think that a clear breach of this provision was made in the present case

It is also contended on behalf of the petitioner in this connection that the Returning Officer committed a breach of another rule too Admittedly he was absent from the counting room for some time while the counting was going on During the period of this absence the Assistant Returning Officer continued the counting This it is pointed out was a direct contravention of the proviso to section 22 of the Representation of the People Act That proviso requires that no Assistant Returning Officer shall perform any of the functions of the Returning Officer which relate to the acceptance of a nomination paper or to the scrutiny of nominations or to the counting of votes unless the Returning Officer is unavoidably prevented from performing the said functions In the present case when the Returning Officer left the counting room either for his lunch or for any other official business, his absence cannot by any stretch of language be considered to have been unavoidable During his absence therefore the counting should have been stopped The Assistant Returning Officer could not perform the functions of the Returning Officer relating to the counting of votes in his absence The petitioner's contention on this point too therefore appears to be well founded

Rule 48 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 lays down —

> "When the counting of votes recorded in favour of each candidate both in ballot papers contained in the ballot boxes and in postal ballot papers has been completed, the Returning Officer shall subject to the provisions of section 65 and in the case of an election in a constituency where the seats to be filled include one or more seats reserved for the Scheduled Castes or for the Scheduled Tribes, subject also to the provisions of Sub section (1) of section 54 forthwith declare the candidate or candidates to whom the largest number of valid votes has been given, to be elected "

There are two provises to this rule We are not concerned with the second proviso The first one lays down —

> "Provided that upon the application of any candidate his election or counting agent in that behalf, a total or partial recount shall be made before the Returning Officer makes the declaration but the Returning Officer may reject any such application as may appear to him to be frivolous or unreasonable recording at the same time the grounds for such rejection"

Rule 48 is followed by Rule 49 which requires verification of the account supplied by the presiding officers in Form 10 with the entries made in Form 14 Then follows Rule 50 according to which "the Returning Officer shall then prepare and certify a return in Form 16 setting forth certain particulars It also provides that the candidates or their election or counting agents shall be allowed to take copies of extracts from such return

It is contended by the petitioner that the Returning Officer in the present case committed a breach of Rule 48 and 50 in as much as (a) he declared the result only after preparing the return in Form 16 and not before it He thus deprived the petitioner of an opportunity of claiming total or partial recount (b) The Returning Officer broke Rule 49 as he opened Form 10 at the very beginning of the counting and not after the counting was over

So far as the second ground is concerned it appears to be based on a wrong statement made by Kedar Nath (D W 7) He said at one place in his cross examination that Form 10 had been opened before the counting began It appears to us that the petitioner had never set up this case in the application (paper No 52 B) which the petitioner filed giving particulars of the omissions and commissions of the Returning Officer in respect of which he had a grievance It was said there in para 3 that the ballot paper accounts (*i e* Form 10) were not opened before the counting of the ballot papers In his application (paper No 117 C, Ex 30) in para 7 it was said that the counting of votes was done by the Returning Officer and his staff candidate wise and not polling station wise in total disregard of the provisions of Rule 46 (1) (v) in the Election Rules and no reference was made to the statements in Form 10 inspite of the protests In his statement the petitioner stated that the ballot paper accounts had not been opened before him at any stage. The

contention is that the ballot paper accounts were opened at the beginning and not after the counting was over. This appears to be incorrect. In fact there is no evidence to show that the comparison required by Rule 49 between the figures entered in Form 10 and the figures entered in Form 14 was done before the counting was begun and not after it was over.

About *the first contention it is admitted that the return in Form 16 was prepared before* the result was declared as required by Rule 48. This in our opinion amounted to a breach of the Rules. Rule 48 precedes Rule 50 and the word 'then' used at the beginning of the Rule 50 makes it quite clear that the return in Form 16 required by Rule 50 is to be prepared after the declaration of the result as contemplated by Rule 48. That rule requires that the result should be declared "forthwith" after the counting is over. The return in Form XVI is to be prepared later after the result has been declared under Rule 48. It may however be said that if the result is to be declared immediately after the counting is finished the candidate will be deprived of the right to claim recounting under the proviso to Rule 48. Rule 48, it will be noted does not require the declaration of the result "immediately" after the counting is over but the word "forthwith" is used in it. The word has a well-settled meaning in law and is considered to be anonymous with the term as soon as the circumstances permit'. In case a recount is claimed therefore it is permissible to declare the result after it is done. In England under clause (2) of Rule 47 of the Parliamentary Election Rules 'no step should be taken on the completion of counting of votes until the candidates and their election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by this rule (the right to claim recount). There does not appear to be any corresponding provision in our Rules. Under the proviso to Rule 48 the recount must be claimed before the result is declared and after the counting has been completed. In the present case some time actually elapsed between the completion of counting and the declaration of results because the return in Form 16 was prepared during that interval. The petitioner, if he wanted to claim recount could do so during that time. He however does not appear to have claimed recount either partial or total at that stage or at any stage. He cannot therefore claim that he has been deprived of any right of recount because the Returning Officer declared the result after preparing the return in Form 16 and not before preparing that return.

In respect of this sub-issue, therefore, our finding is that Rule 46 (2) was certainly broken. There was a breach of the proviso to sec. 22 of the Representation of the People Act also. There was no breach of Rule 46 (1) (vi) or Rule 49. There was a breach of Rules 48 and 50 only to this extent that the declaration of result and the preparation of the return in Form 16 were made in the wrong order. But the petitioner was not deprived of any right of recount on account of that breach.

Issues 1 (a) (v) and 1 (a) (vi) and issue 2 (a).—These issues have to be considered together because they relate to the same grievance of the petitioner *viz.* that counting was done in the present bye-Election candidate-wise instead of polling-station-wise. In sub-rule (1) of Rule 46 as it was originally framed there was a clause numbered as clause (ii) according to which all the ballot boxes allotted to each particular candidate were to be separated from those allotted to any other candidate and placed together. Then there was clause (v) which originally stood like this:—

> "If the Returning Officer is satisfied that all the ballot boxes used at the poll have been received and are in order, he shall take up the counting of ballot papers contained in the ballot boxes. The counting of all the ballot papers contained in the ballot boxes allotted to the same candidate should be completed before the counting of the ballot papers contained in the ballot boxes allotted to any other candidate is commenced. As amongst the candidates the counting of votes shall proceed in the order in which their names occur in the list of validly nominated candidates published under Rule 11 in respect of the election."

This method of counting was known as the candidate-wise method because the ballot boxes of each candidate in respect of all polling stations had to be kept at one place and the counting of ballot papers relating to one candidate was to be completed before the counting of the ballot papers of another candidate was started. In October 1952 by notification No. SRO 1788 published in the Gazette of India, Extraordinary, dated 25th October 1952 Part II Sec. 3 page 803 these two clauses of sub-rule (1) of Rule 46 were amended. Clause (ii) was deleted altogether and clause (v) was substantially amended. In its amended from clause (v) stands like this:—

> "If the Returning Officer is satisfied that all such ballot boxes as contain the ballot papers which are to be counted at such place have been received and are in order he shall take up the counting of ballot papers contained in the ballot boxes. All the ballot boxes used at a polling station shall be opened, and the counting of the ballot papers found in these boxes proceeded with at the same time as far as practicable."

This amended method of counting is known as polling-station-wise because according to it the ballot papers found in the ballot boxes of all the candidates at a particular polling station have to be counted at the same time and after the ballot papers received at one polling station have been counted in respect of all the candidates, the ballot papers received by them at another polling station are to be taken up for counting.

The contention of the petitioner is that in view of the amended rule, at the time of the counting of votes in the Bye-election in dispute, the counting should have been done polling-station-wise and could not have been done candidate-wise. In counting the ballot papers candidate-wise the Returning Officer intentionally and deliberately committed a breach of the rules.

It has not been seriously disputed before us that clause (ii) of sub rule (1) of Rule 46 was deleted and clause (v) was amended with the express intention of altering the method of counting from candidate-wise to polling station-wise. In April 1954 a summary of Directions and Instructions Regarding Conduct of Elections was issued by the Government of U.P. (Election Department) Parliamentary Section and at page 4 of the Directions under heading 'Counting of Votes and Declaration of Result' it was mentioned at serial number 1 with reference to G.O. No. E-1049/XVII-334-52, dated April 10, 1954 that on account of the amendment of Rule 46 of the Election Rules, 1951, the counting of votes will now be polling station-wise instead of candidate-wise. The old form 14-A was omitted by notification No. SRO 2008 dated 17th December 1951 printed in the Government of India Gazette, Extraordinary, Part II Sec. 3 page 1499 and the original form 14 was substituted by a new form 14 by notification No. SRO 1788 dated 25th October 1952. This substitution of a new form 14 for the old form 14 was made to fit in with the changed procedure of counting from candidate-wise to polling station-wise

It is conceded that when the counting took place in connection with the Bye-Election in dispute it was done candidate-wise and not polling station wise. The respondent tried to justify this on two grounds. Her contention in the first place is that the amended rule gave to the Returning Officer a discretion in the matter and he could do the counting candidate-wise if he considered it proper. The learned counsel for the respondent particularly stressed in this connection the words 'as far as practicable' used at the end of the amended clause (v) of sub-rule (1) of Rule 46. Her second contention is that if the counting was done candidate-wise there were lesser chances of the ballot papers of different candidates being mixed up and it was also likely to save time.

The second contention appears to be obviously unacceptable. The chances of mixing up of the ballot papers if the counting was done polling station-wise could easily be obviated if the ballot boxes of each candidate relating to one polling station were opened on a different table and the ballot papers taken out of the boxes were counted at that table after being made up in bundles. In that case there could be no question of the ballot papers of more than one candidate being mixed up. Then whether the chances of the ballot papers getting mixed up were greater in the candidate-wise method or in the polling-station-wise method must have been considered by the framers of the Rule before they amended the rule and altered the method. They must be presumed to have known the advantages and disadvantages inherent in both the methods and to have preferred the polling station-wise method to the candidate-wise method deliberately. The Returning Officer could not in the circumstances claim to be wiser than the framers of the Rule. In any case even if he held a different opinion that the superseded rule was in some respects better than the new rule, he should have complied with the latter and had no justification for ignoring the revised method which had been deliberately introduced. The excuse that counting polling station-wise would have taken more time than counting candidate-wise also appears to be unconvincing. The total number of ballot papers to be counted would have been the same in either case and the same time would have been taken in the counting whatever method of counting might have been adopted.

In our opinion as the rule stands there is no discretion in the Returning Officer for substituting candidate-wise counting for polling station-wise counting. The rule expressly requires that the ballot boxes used at one polling station should be opend and the counting of ballot papers proceeded with at the same time. The words 'as far as practicable' on which great reliance has been placed appear, in our opinion, to be meant only to provide for these contingencies in which it is not possible for one reason or an other to open all the boxes or to proceed with the counting of the ballot papers of all candidates at the same time. For instance if one particular ballot box gets jammed and cannot be opend for some time, or if the number of counting clerks is inadequate or the space available for counting is insufficient some boxes can be opened and the counting of ballot papers contained in them can be proceeded with without opening all the boxes at the same time or the simultaneous commencement of the counting of the ballot papers in all the boxes. We think on the basis of the words 'as far as practicable' the Returning Officer could not alter the rule altogether and ignore the amendment of the rule and the directions issued by the Election Department. He could not on that excuse follow the superseded procedure instead of the

prescribed one We have therefore no hesitation in holding that in doing the counting candidate wise the Returning Officer in the case of the Bye Election in dispute committed a clear breach of clause (v) of sub rule (1) of Rule 16

It was also contended in this connection that the Returning Officer committed a breach of the instructions contained in para 17 A of the Instructions Regarding Counting of Votes and Declaration of Results that were issued by the U P Government Legislative (Elections) Department in 1952 and also of the Provisions contained in Chapter X of the Handbook for Candidates for Election to the House of the People etc issued by the Election Commission of India and printed and published by the S G P at the Government Central Press Trivandrum in 1951 The only clause of para 17 A to which our attention has been drawn in this connection, requires that the Returning Officer should read and re read carefully the provisions of the rules for strict compliance The Returning Officer in the present case has stated that he had read the rules before he started the counting No breach of para 17 A can therefore be said to have been committed No provisions of Chapter X of the Handbook referred to above can be said to have been broken because the provisions are not rules to be followed They are only instructions for the guidance of the candidates and as has been said in the preface the Handbook contains only an informal summary of the Rules and on all points of doubt reference is required to be made to the original Act and the Rules

In respect of these sub issues therefore, our finding is that caluse (v) of sub rule (1) of Rule 46 has been broken because the counting was made candidate wise instead of polling station wise There was no other breach

Issue 2 (*b*) —It is contended on behalf of the respondent that the petitioner as well as the Jan Sangh candidate consented to the counting being done candidate wise and the petitioner cannot therefore raise any objection to it now It is however conceded that no express consent was given or obtained The only thing said is that as no objection was raised, consent is to be implied The petitioner and his counting agent as also Sri Nana Desh Mukh the counting agent of the Jan Sangh candidate have stated in clear terms that before the counting started they protested and requested the Returning Officer to read the amended rules and to do the counting polling station wise They say that this request of theirs was overruled

In our opinion that Returning Officer had no justification for presuming consent simply because no objection was raised and if an objection was raised he had no justification for overruling it It was his duty to follow the rule as it stood Implied consent could not in our opinion justify a breach of the rule There is also no question of the petitioner being stopped from questioning the incorrect procedure followed by the Returning Officer in connection with the counting He could raise the question in his election petition even if he had not raised an objection at the commencement of the counting

Issues 1 (*b*) *and* 2 (*c*) —Under the Representation of the People Act, 1951, non compliance with the provisions of the Constitution or of the Act or of any Rules or any Orders made under the Act or of any other Act or Rules relating to the Elections does not amount to a major corrupt practice or illegality which can by itself vitiate an election It also does not fall under the category of minor corrupt practice described in sec 124 of the Act Under sec 100(2) (c) of the Act however if the Tribunal is of opinion that the result of the election has been materially affected by any such non compliance it can declare the election of the returned candidate to be void At one time there was a difference of opinion as to who was to prove that the result of the election had been materially affected by the non compliance In the case reported in 1 Indian Election Petitions 73 S S Ghosh *vs* S N Basu following some English cases and in particular the observation of Sir Ashtosh Mukerji in the case reported in 24 C W N 189 S C Basak *vs* Chairman Dacca M Board it was held that if a breach of some rule was established it was for the person who was upholding the election to prove that the breach had not affected the election materially In the case of Abdul Rauf *versus* G B Pant reported in 8 Indian Election Petitions page 240 however it was pointed out that the law in England was different in this respect from the law in India In India the burden of proving that the result of the election has been materially affected by a breach of some provision in any Act or Rules lay on the person who asserted the same The controversy appears to have been set at rest by the observations of their Lordships of the Supreme Court in the case of Vashisht Narain Sharma *vs* Deo Chand, reported in 1951 (S C) 517 Their Lordships addressed themselves to the question of burden of proof in para 4 of the judgment and after pointing out the difference between the provisions of the English ballot Act 1872 and the provisions of the Indian Representation of the People Act, 1951 they said —

> "This section (sec 13 of the English Ballot Act 1872) indicates that an election is not to be declared invalid if it appears to the Tribunal that non compliance with statutory rules or any mistake in the use of such provision did not affect the result of the election This shows the onus on the person who seeks to uphold the election The language of sec 100 (1) (c) of the Representation of the

People Act, 1951, however clearly places the burden upon the objector to substantiate the objection that the result of the election has been materially affected. On the contrary under the English law the burden is placed upon the respondent to show the negative *viz.* that the result of the election has not been affected."

In the subsequent case of U. B. Kamath *vs.* Ahmad Ishaq reported in 1955 (S.C.) 233 their Lordships reiterated this view and said:—

"Section 100 (2) (c) requires that before an order setting aside an election can be made two conditions must be satisfied. It must first be shown that there had been improper reception or refusal of a vote or reception of any vote which is void or non-compliance with the provisions of the Constitution or of the Act (Act XLIII of 1951) or any Rules or Orders made under that Act or of any other Act or Rules relating to the Elections or any mistake in the use of the prescribed form. It must further be shown that as a consequence thereof the result of the election has been materially affected. The two conditions are cumulative and must both be established. The burden of establishing them is on the person who seeks to have the election set aside. This was held by this Court in the the case of Vashisht Narain Sharma *vs.* Deo Chand, A.I.R. 1954 (S.C.) 513."

These observations must therefore be held to have settled the controversy and it is no longer in doubt that it is for the petitioner who seeks to get the election declared void to prove not only that certain provisions of the Representation of the People Act or the Rules framed thereunder have been contravened but also that the result of the election in question has been materially affected on that account.

In the petition itself though the petitioner stated that the result of the election had been affected by the breaches of which he complained, he did not point out how that result had been affected. Even when the case was being argued his learned counsel made no attempt to show that the result in the present Bye-Election had been materially affected on account of the breaches of the Rules which are alleged to have been committed. It cannot be overlooked that the difference in the number of votes secured by the petitioner and the other candidates was in the present case considerable. The respondent no 1 had received 49,854 votes, the petitioner had received 34,578 votes and Sri Atal Behari Bajpai, the Jan Sangh candidates, had received 33,986 votes. In the face of these figures a few votes one way or the other could not make much difference. A vague suggestion was made that at some stage the votes cast in favour of the petitioner had been counted as votes in favour of the respondent no. 1. It was hinted that this had been done because Form 14 was not being prepared as the counting was proceeding. It was also pointed out that according to the petitioner's evidence some sort of secret conference was held between the Officers who were responsible for counting shortly before the result was announced. Hints or suggestions, clear or faint, cannot however be given much value in a court of law. If the petitioner wanted to put forward the case that there had been a manipulation of votes or that some of his votes had been counted as votes cast in favour of the respondent No. 1, he should not only have clearly and unambiguously put forward that case in the petition but should also have led specific evidence on the point. Nothing of the kind has been done.

Some evidence was produced to prove that the workers and agents of the petitioner expected in respect of some polling stations that a large number of votes must have been cast for him than were found at the counting to have been cast. The evidence on this point consists of the statements of Sri D. C. Vidyarthi (P.W. 5), Sri Jagmohan Lal Srivastava (P.W. 10), Sri Ram Kishore Bhatnagar (P.W. 13), Sri Abinash Chandra Shastri (P.W. 15) and Sri Raj Narain Sinha (P.W. 16). They have stated that the polling stations at which some of them were working cards were issued to the various electors on behalf of the various candidates. The expectation was that the voters who took the card from a particular candidate would vote for him. Of course, there was no certainty about it. The elector could take a card from more than one candidate and could, if he liked, vote for a candidate from whom he had not taken the card, or could come away without casting his vote at all. On the basis of the cards issued from their camp these workers of the petitioner made rough estimates of the number of votes which the petitioner must have received at the polling place where they were working. They mentioned those figures in their evidence. At the most the figures were only rough estimates about whose correctness there could be no certainty. Without going into the question whether the evidence of these witness is really admissible, even if it is taken into consideration, it is not possible to attach much value to it. Such estimates depend more on conjecture than on actual facts. Simply because the result of the election was not in accordance with the expectations of the petitioner or his workers and (in the natural course they might have been over optimistic in this respect) it is not possible to infer that there had been any actual manipulation of votes. That should have been established by evidence and has not been so established.

The most important breach of the rules which was committed by the Returning Officer in the present case was of the rule requiring counting to be done polling-station-wise. In the absence of any manipulation of votes we are unable to see how the result of the election

could have been affected whether the counting was done polling-station-wise or candidate-wise The number of votes cast in favour of the particular candidates must have remained the same in either case It cannot be said that if the counting had been done polling station wise, the number of votes received by the petitioner would have been found to be greater

The other breaches which have been established appear to be of a minor and unimportant nature Thus the omission to put the bundles of ballot papers in packets or to use the packet slips the omission to seal the papers before the lunch interval started, the omission to declare the result before preparing Form 16 or the fact that the counting was continued by the Assistant Returning Officer even when the Returning Officer was absent from the counting room have not been shown to have affected the result of the election in any manner at all There can, therefore, be no question of their having affected it in a material way

Our answer to these issues is therefore in the negative

Issue 1 (*c*)—It is urged on behalf of the petitioner that the Returning Officer, Sri S N M Tripathi, was displeased with him from before on account of the fact that during the last General Elections, the petitioner had filed a complaint against him and had also made a grievance about his conduct in the election petition which he had filed after having lost that election The Returning Officer was also anxious to please the party in power He therefore decided to manage things in such a way that the respondent No 1 might become sure of her success in the election even if she did not actually get the largest number of votes *The petitioner urges that from the very beginning the Returning Officer acted in a* planned manner and everything which he did was done in furtherance of the scheme which he had conceived The rules which he deliberately contravened were contravened with that purpose in view He trampled on the rights of the petitioner and ignored and over ruled his objections He threw a veil of secrecy over the entire proceedings He did not get Form 11 filled in as the counting proceeded He withheld all information about the number of votes which the various candidates had secured at each polling station He did not allow the totals to be checked Immediately before announcing the result a secret conference was held The result which was declared was contrary to every one's expectations. Even the respondent No 1 must have been surprised by it Even after the result was declared the petitioner was not allowed to put his own seal on the papers to avoid all chances of tampering The petitioner urges that all this shows that everything was done in furtherance of a scheme On this account the election cannot be said to be a free and fair election and was in fact no election at all

The learned counsel for the petitioner conceded that the burden of proving the allegation about there having been a scheme or plan rested on the petitioner and also that the burden was a heavy one He however urged that an impossible burden should not be placed on the petitioner and that he should not be expected to prove what it is not possible to prove by direct evidence He said that an inference in favour of the petitioner should be drawn in this case on the basis of the circumstances established He wanted us to use what he describes as a sort of inductive process of reasoning and stressed that as the result was contrary to all expectations, as the evidence of the Returning Officer was not satisfactory and as not one but several rules had been broken it followed as a necessary inference that everything had been done in accordance with a preconceived scheme

It cannot be denied that if there was in fact a scheme or a plan in accordance with which the Returning Officer and his subordinates acted and the result of the election was actually manipulated so as to make the respondent No 1 succeed when in fact she did not command the votes of the majority of the electors it is open to the petitioner to contend that there has been no free and fair election as contemplated by the Representation of the People Act and in that case he is entitled to have the election declared void Such a scheme or plan would obviously amount to fraud and fraud vitiates everything

Before however we can come to the conclusion that there was scheme or plan as is suggested by the petitioner we must have definite and positive evidence to justify our conclusion It is well known that it is not always possible to prove fraud by direct evidence and recourse has to be had to circumstances and probabilities in order to see whether any fraud or scheme exists or not The rule of circumstancial evidence which has to be followed in such cases is also well established The circumstances relied upon must be proved beyond doubt and the inference that is sought to be drawn from them should follow inevitably and should be inconsistant with every hypothesis other than the one sought to be proved

Let us therefore see at first whether the circumstances on which the petitioner bases his case on this point have in fact been established These circumstances in the main are

1 that not only one but several rules were broken

2 that the result was contrary to all expectations At one stage even the respondent No 1 herself lost all hopes and left the counting room in a dejected mood Most of her followers also went away She blamed her supporters for having

betrayed her Her followers too went away According to the petitioner even Sri A C Kher, a prominent member of the Congress Party concerned to Sri Raj Narain Sinha and Sri Gopal Narain Saxena P Ws that the petitioner must be held to have won Sri Kher was not examined to rebut the petitioner's evidence on this point

3 A veil of secrecy was thrown over the entire proceedings Form 14 was not prepared at the proper time or in the proper manner Ballot papers were not sealed In fact all information about the counting was withheld and a sort of conference was held shortly before the result was declared

We have already held that some rules were broken by the Returning Officer in certain respects The petitioner has however not succeeded in establishing that any of those breaches or all those breaches taken collectively materially affected the result of the election in any manner Simply because some rules were not followed, we are not prepared to say that the omission was due to any desire on the part of the Returning Officer to help the respondent No 1 or to harm the petitioner Some of the rules broken were obviously of minor importance and were apparently broken because the Returning Officer or his Assistant did not realise the significance of the matter and their attention was not drawn to the breaches at the time when they were committed The only rule of major importance which was broken was Rule 46 (1) (v) In respect of that breach too we are not prepared to hold that it was made with any improper motive We are unhesitatingly of opinion that the Returning Officer did the counting candidate wise because he, in good faith, believed that he had a discretion in the matter and that the counting by that method would be more convenient We have shown that this view of his was not justified but we find no adequate grounds for doubting his good faith in the matter

That the result was contrary to all expectations can also not be held to have been established in a satisfactory manner We have already pointed out that no value can be attached to the rough estimates arrived at by the workers and agents of the petitioner in respect of the number of persons whom they thought must have voted for him We have not at all been impressed by the evidence to prove that the respondent herself lost all hopes at any stage or that she went away in a dejected mood We are not prepared to accept the petitioner's evidence on the point simply on the ground that the respondent has not entered the witness box to rebut it The question of rebuttal arises only when the evidence produced is worth rebutting Nor can any importance be attached to the omission to examine Sri Kher Even if the evidence of Sri Raj Narain Sinha and Sri Gopal Narain Saxena is to be accepted in its entirety, the utmost that it shows is that on the figures which were provided to him, Sri Kher stated that the petitioner must be held to have succeeded Neither Sri Kher nor any one else could be sure of the correctness of the estimated figures

We have already found that the allegation that a veil of secrecy or an iron curtain was thrown over the entire proceeding in the counting room has not been proved The petitioner has also failed to satisfy us that Form 14 was not prepared while the counting proceeded that any information was withheld from him or that any secret conference was held immediately before the result was announced We have already pointed out that manipulation of votes has neither been alleged nor proved

None of the circumstances on which this part of the petitioner's case is based can therefore be held to have been established satisfactorily No necessary inference about there being a scheme or plan can therefore be drawn as is suggested by the petitioner

It has been pointed out by the learned counsel for the respondent No 1 that the Returning Officer, Sri S N M Tripathi was not the only person there in the counting room Besides him there were at least 17 or 18 high placed gazetted officers and a large number of clerks It is not alleged against any of those persons that they personally had any motive for acting in a fraudulent or dishonest manner Nor is it said that all of them were so completely under the influence of Sri Tripathi that they had no respect left for their own conscience Why then should all of them have colluded with Sri Tripathi in the manner suggested by the petitioner It is conceded that if even one of them did not collude the scheme conceived by Sri Tripathi could not have been carried through No objection about there being any scheme or plan appears to have been raised at any stage while the counting was going on There was no suggestion about it in the application which the petitioner filed soon after the declaration of the result (Ex 31) There is also nothing of the kind in the telegram (Ex 28) or in the applications (Exts 29 and 30) addressed to the Election Commission of India, New Delhi As Sri B N Srivastava (P W 21) admits at the end of his cross examination that the petitioner did not tell him in the counting room at any stage that the counting was being done candidate wise with so much secrecy in the interest of one candidate or in pursuance of a scheme Sri Gopal Narain Saxena (P W 8) admits that when he asked Sri Triloki Singh, petitioner, why he had not protested at once and had not come out of the counting room in protest, the reply given by the petitioner was that he was confident of winning in whatever way the counting was done and was therefore

not very much interested in the way of counting or in protesting He even said that when the method of counting was changed Sri Bhupendra Nath Srivastava told him to get alert but he told him in reply that it was not necessary as he was to win in any case From these statements we think we can safely infer that the idea that there was any scheme or plan according to which the Returning Officer was acting is really an after thought which came into the mind of the petitioner only after he had lost and felt greatly dis appointed

In the above circumstances we are unable to accept the contention of the petitioner that there was a scheme or plan according to which the counting was done and which can be held to have vitiated the entire election

Issue No. 5—In view of what we have said above under issues Nos 1 and 2 it cannot be held to have been proved by the petitioner that the Returning Officer rendered any illegal assistance to the respondent No 1 in securing her election No question of his com mitting any major or minor corrupt practice therefore arises and it is not necessary to go into the question whether the election was materially affected by the giving of any such illegal assistance

Issues Nos 3 *and* 4—These issues relate to the allegations made by the petitioner about the committing of major corrupt practices as described in section 123 (2) and 123 (8) of the Representation of the People Act The contention of the petitioner in this connection appears to be four fold. He urges in the first place that in the bye election in dispute several Ministers *viz*, Sarvashri Sumpurnanand, C B Gupta, Hafiz Mohammad Ibrahim, Syed Ali Zaheer, Girdhari Lal and Hargovind Singh personally canvassed for the respon dent No 1 and addressed various election meetings held on her behalf This according to him amounted to a major corrupt practice as described in section 123(8) of the Represen tation of the People Act The respondent No 1 could not under the law obtain any assistance from them, for the furtherance of her own election prospects In the bye election in dispute as she obtained their assistance for that purpose she committed a major corrupt practice

The second contention is that the Ministers above mentioned not only canvassed for the respondent No 1 but actually, abused their exalted position as Ministers by employing State cars National Flag and liveried orderlies when they went to address the election meetings held on behalf of the respondent No 1 This amounted to coercion which fell under the definition of undue influence as given in clause (2) of section 123 of the Representation of the People Act

The third contention is that even if the respondent No 1 is not held to have obtained any assistance from the Ministers above mentioned they, having admittedly worked for her, were her agents and as they obtained the assistance of their chauffeurs and orderlies while going to the various meetings which they addressed on behalf of the respondent No 1, they obtained the assistance of persons serving under the State for the furtherance of the pros pects of that respondent The details of the meetings attended by them are to be found in list 'D' of the petition Under section 123(8) of the Representation of the People Act, even if an agent of a candidate obtains the assistance of a person serving under the State for the furtherance of the prospects of the candidate's election, the act amounts to a major corrupt practice

The fourth contention of the petitioner is that in any case Hafiz Sri Mohammad Ibrahim was an agent of the respondent No 1 He issued an appeal to the voters A copy of that appeal is reproduced in list B of the petition He got it typed, attested and issued to the press by his Personal Assistant Sri Sri Krishna who was a person serving under the State Government This was done for the furtherance of the prospects of the respondent No 1 in the election and on that account amounted to a major corrupt practice It is also urged in this connection that Sri Sri Krishna, who got the appeal typed and issued it to the press after attesting it acted as an agent of the respondent No 1 Even if he was a sub agent of Hafiz Sri Mohammad Ibrahim, who was an agent of the respondent No 1, as such sub agent he also became an agent of that respondent and when he got the appeal typed he obtained the assistance of the clerks serving under the State Government for the furtherance of the prospects of the respondent No 1 in the election and committed a major corrupt practice

It is not disputed on behalf of the respondent No 1 that the Ministers mentioned in the petition by the petitioner canvassed for her and attended some election meetings held on her behalf The main ground on which the first contention of the petitioner mentioned above is sought to be refuted is that Ministers are not persons 'serving under the State" within the meaning of the term as is used in clause (8) of section 123 of the Representation of the People Act An interesting question which thus arises for decision is whether Ministers can be considered persons serving under the State' of which they are the Ministers The

question does not appear to be free from difficulty but after giving our best consideration to the matter, on principle as well as on authority we have come to the conclusion that this question must be answered in the negative.

If a reference is made to the provisions of the Constitution in this connection it will be noticed that under Art. 154 the executive power of the State vests in the Governor. Art. 163 provides that "there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion" Under Art. 164 the Chief Minister is to be appointed by the Governor and the other Ministers are to be appointed by the Governor on the advice of the Chief Minister and the Ministers are to hold office during the pleasure of the Governor. Clause (2) of the same Art. provides that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and according to clause (5) of the Article the salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and until the Legislature of the State so determines, shall be as specified in the Second Schedule. Under clause (3) of Article 166 the Governor has the power to make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. Under Art. 167 it is the duty of the Chief Minister to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation and also to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for.

It is urged on the basis of the above-mentioned provisions by the learned counsel for the petitioner that the Ministers must be held to be persons serving under the State because:

(a) they are appointed by the Governor in whom the executive power of the State vests and they hold office only at the pleasure of the Governor and can be dismissed by him.

(b) it is the Governor who frames rules for the allocation of business of the council of Ministers and the Ministers are bound to communicate to the Governor all the decisions of their Council and their proposals for legislation and to furnish such other information as the Governor may call for. The Governor therefore controls their work.

(c) the Ministers get salary from Government Treasury.

(d) the position of the Ministers is subordinate to that of the Governor.

(e) even though technically the Ministers may not be considered to be "Government servants", there can be no escape from the position that they are persons serving under the Government of the State.

It appears to us that none of these contentions can bear scrutiny.

It is true that a Minister is appointed by the Governor and holds office during his pleasure but the appointment or dismissal of a Minister by the Governor does not stand on the same footing as the appointment or dismissal of any other person serving under the State. A person can be appointed as Chief Minister by the Governor only if he commands or is expected to command the majority of the legislature and Ministers can be appointed only on the recommendation of the Chief Minister. The Minister must be a member of the legislature and if he is not one he must get himself elected or nominated as a member within six months of his appointment otherwise he will have to vacate his seat. There is no provision in the Constitution entitling the Governor to dismiss any particular Minister. The whole Council of Ministers stands or falls together. As there is joint responsibility, so long as the Council of Ministers enjoys the confidence of the legislature it cannot be removed. The position of Ministers so far as appointment and dismissal is concerned is not at all analogous to that of any other Government servant. In this connection it is also worth noting that Part XIV of the Constitution which relates to the services under the Union and the States does not appear to be applicable to the case of Ministers.

The functions of a Council of Ministers is primarily advisory. The Governor is certainly entitled to frame rules for the allocation of business among Ministers and for the convenient transaction of the business of the Government of the State but from this it does not follow that the Governor can control the way in which the Ministers are to carry on their work. The Governor has no concern at all with the day to day work of the Ministers and cannot under the Constitution interfere with it. He cannot even lay down the policies which are to be followed or the results that are to be achieved. That is the Minister's own responsibility and for it they have to take the cue not from the Governor but from the

legislature to which alone they are answerable It is therefore not possible to say that the relation between the Governor and the Ministers is akin in any way to that between a Master and a servant It is now well settled that a servant is a person subject to the command of his master not only as to the result of the work but also as to the manner in which he is to do the work In the case of Goolbai Motabhai Shroff v. Pestonji Cowasji, reported in 37 Bom L R 110 at page 415 Wadia J laid down —

> "A servant is a person who voluntarily agrees whether for wages or not to subject himself at all times during the period, of his service to the lawful orders and directions of another in respect of the work to be done by him It is that other person who is entitled in law to give orders and to have them obeyed The relationship therefore exists only between persons of whom the one has the control of the work done by the other, and it does not depend merely on the mode of payment for service, or on the time for which services are engaged or the nature of those services or on the power of dismissal, though these are certainly matters which the court may take into consideration in assessing the relationship The test, therefore is the right of control which a person has in the manner in which the other does the work"

A similar view was taken in a recent case by their Lordships of the Supreme Court in the case reported in 1955 S C 104 Shivnandan v/s Punjab National Bank, they distinguished between a servant and an independent contractor While dealing with the tests which were to be applied for distinguishing between the two they quoted with approval the following dictum of Pollock in his Law on Torts (pages 62 and 63 of Pollock on Torts Edn 15) —

> "A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or as it has been put, 'retains the power of controlling the work' a servant is a person subject to the command of his master as to the manner in which he shall do his work"

They also relied on a passage in Salmond's Treatise on the Law of Torts where it was said —

> What then is the test of this distinction between a servant and an independent contractor The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done A servant is an agent who works under the supervision and direction of his employer, an independent contractor is one who is his own master A servant is a person engaged to obey his employer's orders from time to time

The observations of Lord Porter in a decision of the House of Lords in the case of Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd 1947 AC 1(G) were also referred to where he had said —

> Many factors have a bearing on the result Who is paymaster who can dismiss, how long the alternative service lasts what machinery is employed have all to be kept in mind The expressions used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged"

A servant is therefore one who is subject to the control of another who can be considered to be a master not only in respect of the result which is expected but the manner in which it is to be brought about

If we apply the above mentioned tests it will become obvious that the Ministers cannot be considered to be the servants either of the Governor or of the State Neither the Governor nor the State has any control over the result which has to be obtained by the Council of Ministers or by the manner in which that result is to be obtained The Council of Ministers is responsible only to the legislature In accordance with the sense of the legislature it is for the Council of Ministers not only to lay down the policy which is to be followed but to see that it is carried out Even if the Governor wants the Council of Ministers to act in a particular manner under the Constitution he cannot force the Council to act in that manner The only body to which the Ministers are to be responsible is the legislature and by no stretch of language can the Ministers be called the servants of the legislature Even if they are the servants of the legislature they cannot on that account be considered to be persons serving under the Government In fact they themselves constitute the Government and it is obvious that a person cannot at the same time be a master as well as a servant

The mere fact that the Ministers get their salary from Government Treasury cannot make them persons serving under the Government Receipt of salary by itself is no

criterion for judging as to whether a person is a servant or not. A person may be a servant even though he is not getting a salary and a person may not be a servant even though he gets a salary.

The argument that Ministers are persons serving under the State because they are subordinate to the Governor is based primarily on the decision of their Lordships of the Privy Council in the case reported in 1945 P. C. 156, Emperor v. Shibnath Bannerji. That case was decided with reference to the Government of India Act, 1935, and their Lordships laid down in that case that the view taken by the Calcutta High Court in Emperor vs. Hemendra Prasad Ghosh I.L.R 1939 (2) Calcutta 411, that a Minister was not an officer subordinate to the Governor was not correct. The only thing which their Lordships therefore laid down was that a Minister was an officer subordinate to the Governor. As was pointed out in the case of Amirchand v. Surendra Lal Jha, 10 Election Law Reports page 57 at page 67 even if the Ministers were officers subordinate to the Governor, that did not necessarily mean that they were persons serving under the Government or that the relations between them and the Government was that of servants and master. It was also pointed out in that case that a Minister would fall under the definition of public servant as given in clause (9) of section 21 of the Indian Penal Code but he would still not become a person serving under the State because all public servants are not necessarily servants of the State.

Being a person responsible to the legislature of a State a Minister holds a peculiar position. Along with his colleagues in the Council of Ministers and the Governor he forms the Government and responsible for carrying on the day-to day affairs of the Government. At the same time he has to see that the Council of Ministers of which he is a member continues to command the confidence of the majority of the persons elected to the legislature. He has to keep his contact with the electors and in order to secure the support of the majority it may become necessary for him to do many things which may not be open to every servant of the Government to do. He thus possesses a sort of dual capacity He is a public man—a political leader and at the same time a part of the Government of the State in which he works. It is this dual capacity which distinguishes him from persons serving under the Government and which puts him in an entirely different category.

"A person serving under the Government" is certainly not synonymous with a "Government Servant" and there is an essential difference between the two terms. It is however not correct to say that though a Minister is not a Government servant he is a person serving under the Government. He can fall under latter category only if the relationship of master and servant is shown to exist between him and the Government and it has already been shown that relationship does not exist between a Minister and the Government.

We are supported in the view we have taken on this question by the decision in the case of Amirchand v Surendra Lal Jha reported in 10 Election Law Reports 57 in which this point had directly arisen. In that case the question was as to whether Ministers were persons serving under the State or not and was answered in the negative. It was laid down at page 70:—

> "Ministers are officers appointed by the Governor but they are in no sense servants of the State Governments, and the rules requiring Government servants to refrain from taking part in election propaganda or in any other way assisting a candidate in an election, do not apply to them."

If Ministers are not persons serving under the Government as has been shown above, even, if the respondent No 1 obtained their assistance in furtherance of her prospects in the bye election in dispute, that could not amount to a major corrupt practice as contemplated by section 123 (8) of the Representation of the People Act

It was however contended that, in the first place Ministers had no right to go canvassing for the respondent no. 1 even if they could canvass for the respondent no. 1 and address meetings held on her behalf, they had no right to abuse their position by using the paraphernalia of their office. They went to the meetings in State cars flying National Flags and were accompanied by liveried orderlies. All this was done to coerce the voters and to overawe them so that they may be compelled to cast their votes in favour of the respondent No. 1. Evn, if it was not a corrupt practice as contemplated by clause (8) of section 123 it could certainly fall under clause (2) of that section.

This contention too appears to us to be entirely unacceptable. Though in the petition the petitioner said that the Ministers who worked as agents of the respondent no. 1 were guilty of coercion, he did not give any particulars of the allegation of coercion there. When the issues were framed his counsel was required to give the particulars and stated:—

> "The petitioner is not in a position to give any particulars of the coercion alleged in para 15 of the petition but the petitioner contends that canvassing by persons of the status mentioned in list 'D' tantamounted to coercion."

According to the petitioner therefore because the Ministers are persons of high status and influence any canvassing done by them must amount to 'coercion" The word "coercion" has however not been used in section 123 of the Representation of the People Act Under clause (2) of that section the term used is undue influence and it has been defined as 'any direct or indirect interference or attempt to interfere on the part of a candidate or his agent with the free exercise of the electoral right" There is a proviso added to the clause in the first part of which we find a mention of certain acts which must be deemed to be interference as contemplated by the clause and in the second part of it are mentioned certain other acts which cannot be deemed to be interference within the meaning of that clause

The dictionary meaning of the word canvass is to solicit votes or to use efforts to obtain an office or position The expression canvass used in connection with an election therefore appears to mean "to endeavour to persuade a person to give or dissuade a person from giving his vote or to remain neutral' When it is urged that Ministers have no right to canvass for the candidate set up by the parties it is forgotten that they have a dual capacity The right to canvass must be conceded to them as leaders of the political party which has a majority on the legislature and which has to maintain that majority in order to function effectively If they have a right to vote and to stand as a candidate they also have a right to canvass for themselves and for the other candidates set up by their party Even in England and Canada where Ministers are considered to be servants of the Crown they can canvass in Bye Elections However high the status of a Minister may be and however great may be the influence which he commands, if he only solicits votes and tries to persuade the electors to vote for a candidate in whom he is interested and asks them not to vote for any other candidate or to remain neutral and does nothing more, he cannot be said in our opinion to interfere unduly with the free exercise of the electoral right of voters Of course if he does anything of the nature described in part (a) of the proviso to clause (2) of section 123 of the Representation of the People Act the matter will become entirely different In the present case however there is no allegation or proof and it is not even suggested that the Ministers mentioned in list 'D' of the petition did anything of the kind described in part (a) of the proviso to the clause or acted in any other way which could in fact or law amount to interference with the free exercise of the right of voters Mere canvassing therefore cannot bring the Ministers in question within the mischief of clause (2) of section 123 of the Representation of the People Act

The question whether a Minister while canvassing can use the paraphernalia of his office or has to divest himself of the same arose for consideration in the Habiganj South case reported in Hammond's Election Cases at page 387 and it was laid down at page 394 —

> "We are not aware of any rule requiring a Minister to resign office before offering himself as a candidate for re election We cannot therefore say that the respondent committed any irregularity in choosing to remain in office while conducting his election campaign In the circumstances it was inevitable that he should to a certain extent combine canvassing with official work It was also inevitable that whenever he went out canvassing he should be attended 'with all the prestige and powers of his high official position' We do not see how he could leave these behind so long as he was Minister, any more than he could leave his own shadow behind '

In the case of Ramchandra Chowdhuri vs Sadasiva Tripathy reported in 5 Election Law Reports 401 the observations in the Habiganj South case were quoted with approval and it was laid down that a candidate who was a Minister could not be guilty of corrupt practice under section 123(8) of the Representation of the People Act 1951 merely because during the course of his official tours as Minister he conducted his electioneering campaign also

In the case of Linge Gowda vs Shivanamjappa 6 Election Law Reports 238 a Minister had visited several places in the constituency and made speeches It was urged that that amounted to putting undue influence on the entire electorate The contention was however negatived and it was laid down that 'as leaders of the party they had every right to declare to the public its public policy without any intention to interfere with their electoral right and such actions on their part will not come within the ambit of proviso (b) to clause (2) of section 123 of the Representation of the People Act 1951 as under that proviso *inter alia*, a declaration of public policy without intent to interfere with any electoral right does not amount to any undue influence" Reference was made in that case to the case of Rai Bahadur Surendra Narayan Sinha v Babu Amulyadhone Roy and others reported in 2 Deoabia's Election Cases 368 in which the Chief Minister of Bengal had issued a mandate in the Assembly under his signature only as leader on the date of the election, that the members had to exercise their preference for the candidates in the order named therein It was held that he was entitled to use his influence as leader of the party in that manner and could not be divested of that right simply because he was chief Minister at the time

It follows from the observations made in the above mentioned cases that a Minister has not only a right to canvass for the candidates supported by his party but cannot be expected to divest himself of the paraphernalia of his office while so canvassing. The mere fact that the Ministers went to the election meetings in State cars flag the National Flag or were accompanied by their orderlies or shadows cannot in the circumstances be held to have amounted to their using undue influence over the votes within the meaning of clause (2) of section 123 of the Representation of the People Act.

Two more points are worth mentioning in this connection. The first is that in the petition itself no grievance was made of the fact that the Ministers used the National Flag or misused their official position by taking their liveried orderlies or shadows along with them. The only thing which was alleged in list 'D' and para 15(b), was that the Ministers had used State cars driven by chauffeurs paid by the State when they went to attend the election meetings held on behalf of the respondent no. 1. The evidence led about the use of the National Flag and about the Ministers being accompanied by liveried orderlies or shadows must therefore be considered to be based on an afterthought and loses much of its value on that account. The second thing which has to be pointed out is that on account of their position, status and the nature of their duties the State has considered it necessary to provide certain amenities for the Ministers including State cars, shadows and orderlies. Under notification No. M,173/34/CEO 75/52, dated 18th February 1954 Ministers are entitled to suitable conveyances. The maintenance charges of these conveyances including running expenses and the costs of their chauffeurs are to be borne by the State. These conveyances can be used for official as well as for unofficial tours. The only limitation is that the petrol costs for non official use can be charged to the account of the Government only upto the extent of 75 gallons per month. If therefore Ministers are not persons serving under the Government and on account of being leaders of the party which forms the Government, they have to keep their contact with the electorate and maintain the majority of their party in the legislature and are on that account not debarred from canvassing, there appears to be no logical reason why they should not be considered entitled to use the State cars which have been provided for their convenience when they go out to canvass for a candidate set up by their party. The cars provided for them must be held to be included in the trappings and paraphernalia attached to their office from which it is not possible for them to get themselves divested.

It is however urged that even if it be conceded for the sake of argument that the Ministers had a right to canvass for the respondent no. 1 and to use the State cars provided to them while so canvassing for her, they had certainly no right to utilize the services of the chauffeurs paid by the Government. These chauffeurs were undoubtedly persons serving under the State and while canvassing the Ministers were the agents of the respondent no. 1. When they went to canvass on cars driven by chauffeurs paid by the Government, they did so for the furtherance of the prospects of the respondent. If as agents of the respondent no. 1 they obtained the assistance of the chauffeurs they must be held to have committed a major corrupt practice as defined in section 123(8) of the Act.

Before this contention of the petitioner could succeed it was for him to prove by clear and convincing evidence that the Ministers mentioned in list 'D' actually utilized the services of chauffeurs paid by the State and thus obtained their assistance. In our opinion the petitioner has failed to discharge the burden that lay upon him on this point.

In the petition itself the numbers of the cars used by the Ministers when they went to canvass for the respondent no. 1 were not mentioned. The names of the chauffeurs whose services were utilized were also not given. The numbers of the cars and the names of the chauffeurs were not given even in list 'D' which was intended to contain the details on the point. When the case first came up for hearing before us on 3rd December, 1955, the petitioner's counsel gave out the registration numbers of certain cars which he said had been used by different Ministers. He also gave the names of chauffeurs attached to those cars. He however expressed his inability to give the names of the chauffeurs who had driven a particular car on a particular occasion carrying a particular Minister to any meeting. The details furnished on the point were thus entirely insufficient.

At first an attempt was made to produce documentary evidence on the point and log books of seven State cars bearing numbers USJ 8627, USJ 7898, USJ 9882, USJ 9429, USJ 8984, USJ 8784 and USJ 9168 were summoned from the office of the Estate Officer. The genuineness of these log books was not disputed and they were marked Exts. 33 to 39. They were expected to show which car driven by which chauffeur was taken by which Minister to which election meeting held on behalf of the respondent No. 1. None of these log books were relied upon before us in order to establish any facts. On 27th February 1956 the counsel for the petitioner allowed these log books to be returned because according to him they were not relevant and their entries had not been proved. After the return of these log books no documentary evidence remained on the record which could prove the petitioner's case on the point.

Oral evidence was however led on the point but not in respect of all the items mentioned in list 'D'. No evidence was let to prove that Sarvashri Syed Ali Zaheer, Girdhari Lal and Hargovind Singh utilized the services of any chauffeurs paid by the Government The items in list 'D' which relate to these Ministers are 6, 8, 9, 9-A, 15 and 17. Item No. 2 of the list relates to Sri Sampuranand and to the meeting held on 4th February 1955 in the Ganga Prasad Memorial Hall, Lucknow. In this connection great reliance was placed on the statement of the Chief Minister himself which was made on 30th December 1955. A perusal of the statement however shows that Sri Sampurnanand said nothing definite on the point. The only thing he stated was that he had probably gone on a State car to attend the meeting that was held in the Ganga Prasad Memorial Hall to inaugurate the election compaign on behalf of Shrimati Shivrajwati Nehru, the respondent No. 1. He added that Chhote Lal was his driver in February 1955 and was still serving him and what most probably he was the driver who took him to the meeting. It is clear from this that Sri Sampurnanand was not at all definite on the point. Chhote Lal was also examined and is P.W. 9. He stated that he did not remember if he drove the car on which the Chief Minister Sri Sampurnanand went to the meeting in February 1955. Balak Ram Vaish (P.W. 2), attended the meeting but stated that he went with Sri C. B. Gupta on a private borrowed car. He said nothing about the car in which Sri Sampurnanand had gone to the place. Ram Kishore Bhatnagar (P.W. 13) also stated that the Chief Minister along with Sri C B. Gupta and Hafiz Sri Mohammad Ibrahim had gone to the meeting in State cars He could not give the details of the cars and said nothing about the persons who were driving them It is also worth noting that in the list there is no mention of Sri C B. Gupta or of Hafiz Sri Mohammad Ibrahim having gone to the meeting on State cars. There is therefore no definite evidence to prove that when the Chief Minister went to the Ganga Prasad Memorial Hall on 4th February 1955 the car in which he went was driven by a person serving under the State Government.

The petitioner himself said nothing about the meeting of 4th February 1955 but said that in another meeting held on 21st February 1955 he had seen some two or three State cars standing outside the Ganga Prasad Memorial Hall and had been told by one of the drivers that Babu Ji had come to the meeting He did not say who were the drivers of the cars and also omitted to explain who this Babu Ji was and there is no mention in list 'D' about the meeting dated 21st February 1955.

Items Nos. 3, 11 and 17 of list 'D' relate to Hafiz Sri Mohammad Ibrahim. Three witnesses, Sultanuddin Ahmad (P.W. 3), Syed Husain Ali Shahid (P.W. 6) and P. N. Saithi (P.W. 7), have been examined on this point. They did not say that any chauffeur paid by the Government drove Hafiz Sri Mohammad Ibrahim to the meetings which they saw him attending. They only said that he went to the meetings in State cars. Hafiz Sri Mohammad Ibrahim is however definite that he used his personal car on all such occasions when he went to attend election meetings held on behalf of the respondent No. 1 and that the only exception was when he attended the inaugural meeting of 4th February 1955 held in the Ganga Prasad Memorial Hall. No complaint is made in list 'D' about his attending that inaugural meeting and even in respect of that occasion he has not admitted anywhere that the State car which he used was being driven by a State paid chauffeur.

Sri C. B. Gupta is the Minister to whom items Nos. 1, 3, 5, 7, 9, 10, 12, 13, 14, 15, 16 and 17 of list 'D' relate. Two witnesses Mohammad Kamil Khan (P.W 19) and Syed Hussain Ali Shah (P.W. 7) depose about him. Neither of them is able to give the date of the meeting for which the State car was used by Sri C. B. Gupta. They also do not say that the cars in which he attended the meetings in which they were present were driven by chauffeurs paid by the State. Moreover in list 'D' there is a mention of only one meeting held at Kakori which was attended by Sri C. B. Gupta and that was dated 21st February 1955. Kamil Khan refers to one of the several meetings held at Kakori to which according to him Sri C. B Gupta came in a State car. One cannot therefore be sure that the meeting about which he deposes is the meeting dated 21st February 1955 which has been referred to in item No. 16 of list 'D'. Sri C. B. Gupta was one of the witnesses who was to be examined by the petitioner on commission. For certain reasons however he was given up and was never examined.

There is therefore nothing satisfactory on the record on the basis of which one can record a positive finding that while attending election meetings held on behalf of the respondent No. 1 any of the Ministers mentioned in list 'D' utilised the services of State paid chauffeurs and thus obtained their assistance.

In the above view of the case it does not appear to be necessary to go into the general question whether all these Ministers were in law the agents of the respondent No. 1 Even if it be conceded that they were her agents, if they are not proved to have obtained any assistance of the chauffeurs serving under the State, they cannot be held to have committed any corrupt practice on that account.

The contention on which very great emphasis has been laid on behalf of the petitioner, however is that even if the other Ministers did not commit a major corrupt practice by taking the assistance of the persons serving under the State there can be no doubt that Hafiz Sri Mohammad Ibrahim committed such a corrupt practice He was one of the agents of the respondent No 1 and was one of her active workers In order to further the prospects of her election he wrote out an appeal to voters a copy of which is Ex 26 He wanted to issue the appeal to the press and for that purpose handed it over to his personal assistant Sri Sri Krishna who was a person serving under the State He got three copies of it typed and after attesting the copies sent them to the Pioneer, the National Herald and the Press Trust of India This was done on 19th February 1955 The next day the appeal was duly published in the press and appeared in the Pioneer as well as in the National Herald It is urged that in this manner Hafiz Sri Mohammad Ibrahim as well as Sri Sri Krishna committed a major corrupt practice as described in section 123 (8) of the Representation of the People Act

This contention was very strongly opposed on behalf of respondent No 1 and it was urged that Hafiz Sri Mohammad Ibrahim and Sri Sri Krishna could not by any means be considered to be the agents of the respondent No 1 and nothing which they had done could legally amount to the commission of a major corrupt practice

To start with, three general propositions were put forward in this connection,

(1) That a charge of major corrupt practice is in the nature of a quasi criminal charge and the standard of proof that is required for establishing it is the standard that is employed in deciding criminal cases If there is a doubt, the benefit of it must go not to the petitioner but to the respondent and the persons who are alleged to have committed the said major corrupt practice.

(2) That the charge of a major corrupt practice as contemplated by section 123 (8) of the Representation of the People Act is a very serious charge and a finding on it is likely to have far reaching consequences The provision must therefore be very strictly interpreted and a finding should be given in favour of the petitioner only if there is no escape

(3) That the person who has made the charge is the petitioner and must be required to establish each one of the details alleged by him The benefit of the omission must go to the respondent No 1 or to the persons who are alleged to have committed the major corrupt practice

Two opinions do not appear to be possible in respect of the standard of proof that is required for establishing a charge of major corrupt practice It has been laid down over and over again that an allegation about a major corrupt practice is more or less of the nature of a criminal charge and strict proof is needed to bring home the charge Thus it was laid down in the case of Sri Ram *vs* Mohammad Taqi Hadi reported in 8 Election Law Reports 189

> "Though the procedure to be followed in the trial of election petitions is that laid down in the Code of Civil Procedure, the standard of proof required to prove corrupt practice is the same as in criminal cases Suspicion however strong is not sufficient to prove such a charge The evidence whether it is direct or circumstancial must be conclusive and if there is any doubt, the returned candidate should be given the benefit of that doubt"

The same view appears to have been taken in Rahmat Ali *vs* Nurullah, Doabia's Indian Election Cases 1935-50 Vol I page 121 at page 126 Hari Shankar Bagla *vs* Mr Krishan Chand Puri and others Doabia's Indian Election Cases 1935-50, Vol I, page 127 at page 133; Abdul Rouf *vs* Mukhtar Ali and others, 2 Election Law Reports 340 Desai Basawaraj *vs* Desankop Hasansab and others, 4 Election Law Reports 380 at pages 294 395, Devasharan Sinha *vs* Sheo Mahadeo Prasad and others 10 Election Law Reports 461, Satya Deo Bushahri *vs* Padam Dev and others, 6 Election Law Reports 414 and Krishna Ji Bhimrao Antolikar *vs* Shanker Shantaram More and others 7 Election Law Reports 100 at page 105

As the learned counsel for the petitioner did not dispute this position, we think it unnecessary to cite any more cases in support of this proposition While deciding the question whether a major corrupt practice has been committed or not the most stringent standard of proof must be applied

There is also no dispute about the proposition that the finding that a major corrupt practice has been committed has very far reaching and serious consequences As a result of that finding the respondent No 1 may have to be unseated and if it is found that a major corrupt practice was committed by Hafiz Sri Mohammad Ibrahim who was at the relevant date a sitting member of the U P Legislative Assembly, he may have to face a charge of disqualification While bearing this in mind we cannot overlook the purpose for which section 123 (8) Representation of the People Act, has been enacted The

purpose is to ensure the purity of elections This provision has been inserted in the Representation of the People Act on account of the special conditions prevailing in this country and particularly on account of the fact that democracy here is in its infancy and the ensuring of the purity of elections on that account is all the more necessary Their Lordships of the Supreme Court observed in the case of Jagan Nath *vs* Jaswant Singh and others, reported in 9 Election Law Reports 231 at page 234 —

> "It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essential of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices"

They said in the same strain in the case of Raj Krishna Bose *vs* Binod Kanungo and others, 9 Election Law Reports 294 at page 298 —

> "The policy of the law is to keep Government servants aloof from politics and also to protect them from being imposed on by those with influence or in positions of authority and power, and to prevent the machinery of Government from being used in furtherance of a candidate's return"

At the stage at which our country stands at present in its progress on the way of democracy it is necessary to preserve the purity of elections at all costs so that people's faith in the principle of democacy may not be undermined

The third proposition does not appear to be so non controversial What is urged is that the petitioner must be pinned down to the allegations he made in the petition about the contravention of section 123 (8) of the Representation of the People Act The charges are of a criminal nature and under section 99 of the Representation of the People Act a finding of guilty or not guilty has to be recorded in respect of them Each single allegation made in the charges must therefore be scrutinised and if it is found that any of the allegations has not been established or there be any doubt in respect of it, the whole charge must be held to have failed

The learned counsel for the petitioner however pointed out in this connection that though it was the duty of this Tribunal to employ the highest standard of proof in coming to the conclusion whether the alleged corrupt practice had been committed or not, the charge mentioned in the notice was not a charge within the meaning of the term as used in the Code of Criminal Procedure It only meant an accusation There was therefore no question of the petitioner being pinned down to the various allegations made by him It was also not correct to say that if a single part of the case of the petitioner on the point was not found to be strictly correct, the whole case of the petitioner on the point should fail What the Tribunal has to see is whether on the facts admitted or established all the essentials required by section 123 (8) of the Representation of the People Act have been fulfilled and its contravention has been proved The Tribunal has to take into account not only the allegations made but the evidence produced, the admissions made by the parties concerned and the circumstances and probabilities of the case in fact the entire material present on the record If on those materials the Tribunal fees that it is proved to its satisfaction that the alleged corrupt practice has been committed, it must record a finding to that effect even if in some respects or about some details the allegations made in the petition are not found to be correct to the letter Even in the case of a criminal charge it is not always necessary that every single fact alleged by the prosecution should be found to be true If on the facts admitted or established it is found that the essential ingredients of an offence are established the charge is held to be proved For instance, if in a murder case the prosecution case is that the weapon used was a gandasa but later on in the course of the trial the evidence shows that the weapon used was not a gandasa but a sword and the accused admits that he used a sword, if the other essentials are established a verdict of guilty would be recorded and the case would not fail simply because about the weapon used the prosecution case was not strictly correct In our view the contention of the petitioner's counsel represents the correct legal position and if a finding is to be recorded on the point what is to be seen is whether on facts admitted or established a contravention of section 123 (8) of the Representation of the People Act has been committed or not

Two grounds are urged in support of the contention that Hafiz Sri Mohammad Ibrahim was an agent of the respondent No 1 in the bye election in dispute The first is that Hafiz Sri Mohammad Ibrahim actively worked for her addressed meetings and did canvassing for her He did all this to her knowledge and with her tacit consent She never repudiated anything done by him in this connection and took full advantage of what he did The second ground is that the respondent No 1 had been set up as a candidate by the Congress Party and utilised all the power influence and machinery of the party for her success at the bye election Hafiz Sri Mohammad Ibrahim was a prominent member of the party By agreeing to stand as a candidate of the party the respondent No 1 must be deemed to have agreed to the party and its prominent members, including Hafiz Sri Mohammad Ibrahim, being her agents

The term 'agent' has been defined in section 79 (a) of the Representation of the People Act in the following words :—

"(a) 'Agent' includes an election agent, a polling agent and a counting agent and a counting agent and any person who, on the trial of an election petition, or of an offence with respect to any election, is held to have acted as an agent in connection with the election with the knowledge or consent of the candidate."

It will be noted that the definition is an inclusive one and is not intended to be exhaustive. Whether a certain person is an agent of a candidate or not for election purposes depends on the facts and circumstances of each case. The only thing required is that he must have acted:

(i) as an agent.

(ii) in connection with the election.

(iii) with the knowledge or consent of the candidate.

The law on the point is well settled. Parker has observed in his book on 'Election Agent and Returning Officer' 5th edition at page 311 :—

"The doctrines of election agency are much wider than those of common law agency, and evidence which would be quite inadequate to establish agency at common law, has often been held sufficient in election cases to make a candidate responsible for acts committed by other persons."

According to Halsbury Vol. 12 page 245 para 501: "a candidate's liability under the 'parliamentary common law of agency depends upon a peculiar principle special to this matter and distinct from the principle prevailing in the criminal or civil law of agency. The candidate's liabilty under this principle may extend to the acts of every person who is *de facto* a member of the staff which is conducting the election and whose services are directly or indirectly recognised or made use of by the candidate or his election agents, whether such person be paid or unpaid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work, or the adoption of his work when done.... Canvassers—those who ask persons to vote or refrain from voting—may or may not be agents; but canvassing is one of the things from which agency may be inferred. The mere fact of canvassing is not conclusive, especially if the candidate is himself carrying on a personal canvass. But proof of canvissing at the request, express or implied, of the candidate is sufficient to establish agency."

Blackburn J. observed in the Taunton case (1 O'M & H. 181) as follows :—

"The rule of law has long been established that in parliamentary matters we are not to consider the strict rule of common law agency generally established to this extent, that a person is responsible for his agent in all that he does within the scope of his authority but is not responsible for anything that he does beyond the scope of his authority (the case of the sheriff being the one exception), so that the common rule of law would be that if you employed a man to do an honest thing, and he chose to commit a crime, you would never be responsible criminally, nor even civilly, for the crime committed, whom the instructions you gave him were to act as an honest man. But in parliamentary election law it has long been established that where a person has employed an agent for the purpose of procurring his election he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend it or authorise it, but even *bona fide* did his best to hinder it."

In the Bewdley case (1 O'M. & H. 16) the same Judge laid down :—

"No one can lay down a precise rule as to what would constitute evidence of being an agent. Every instance in which it is shown that, either with the knowledge of his agents who had employment from him, a person acts at all in furthering the election for him, in trying to get votes for him, is evidence tending to show that the person so acting was authorised to act as his agent. It is by no means essential that it should be shown that a person so employed, in order to be an agent for that purpose, is paid in the slightest degree, or is in the nature of being a paid person."

In the case of Borough of Westbury (3, C'M. & H. 78) Mr. Justice Lush observed :—

"An agent is a person employed by another to act for him, and on his behalf, either generally or in some particular transaction. The authority may be actual, or it may be implied from circumstances. It is not necessary, in order to prove agency, to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would

thereby ratify the agency, so that a man may become the agent of another in either of two ways—by actual appointment or by recognition and acceptance of his services"

In the Wigan case (10 M & H 1 at page 13) it was laid down:—

"It has been held that canvassing with the authority of the candidate or the candidate canvassing with him is proof of agency although there may be exceptions to that for instance where canvass is limited or where a person is told only to go and see one or two particular men and ask them for votes There may be cases when canvassing would not necessarily involve agency but general canvassing has always been held to be strong evidence of agency and evidence which requires a very strong case to rebut it if it can be rebutted

The doctrine enunciated in the above cases is popularly known as the doctrine of extended or constructive agency of election law and according to it every person who works or canvasses for a candidate with his knowledge or consent and whose actions have not been repudiated by the candidate must be deemed to have been adopted as his agents even without direct proof of actual appointment

In the present case it was alleged in the petition that the Ministers of the U P Government including Hafiz Sri Mohammad Ibrahim who was the Minister for Finance and Power worked for the respondent No 1, canvassed for her and attended meetings held in connection with her election In list D, of the petition three meetings were mentioned which Hafiz Sri Mohammad Ibrahim was alleged to have addressed In para 11(d) of her written statement the respondent No 1 admitted that the Ministers of U P. Government took interest in her election though she added that they did so in their political capacity to advance the cause of their party because they were members of the Congress" In para 15(b) of the written statement she admitted in express terms that the Ministers whose names are mentioned in schedule D are prominent members of the Congress Party and as such they canvassed for the party candidate' Hafiz Sri Mohammad Ibrahim was examined as a witness by the petitioner and his statement was first recorded on 31st January 1956 on commission He began his statement on that date by saying I worked for Shrimati Shivrajwati Nehru in the last bye election for the House of People from Lucknow District Central Constituency All that I did was that I addressed the election meetings in support of the congress candidate Shrimati Shivrajwati Nehru He further stated that he addressed three election meetings held for the benefit of the respondent No 1 including the inaugural meeting held in the Ganga Prasad Memorial Hall on 4th February 1955 Subsequently Hafiz Sri Mohammad Ibrahim was examined on commission as his own witness and a question was put to him as to what he meant by saying that he had worked for Shrimati Shivrajwati Nehru in the last bye election for the House of People from Lucknow District Central Constituency He replied 'I am an active member of the Congress I am a member of the Pradesh Congress Committee, member of the Executive of the Pradesh Congress Committee, member of the Pradesh Finance (Congress) Committee, and Permanent Invitee to the Pradesh Election Committee I am also a member of the All India Congress Committee as well as of the Working Committee of All India Congress In these capacities I am interested in the success of the Congress, and as such incidentially I did work for Shrimati Shivrajwati Nehru This is what I meant when I made the above noted statement on 31st January, 1956' He thus did not deny even in his later statement that he had worked for the respondent No 1 The only explanation he offered was that he had worked for her because of his political affiliations Whatever may have led him to work for her the fact remains that he did work for her, canvassed for her and attended and addressed meetings for her

An attempt was made to show that in the meetings which Hafiz Sri Mohammad Ibrahim addressed, he did not ask for votes for Shrimati Shivrajwati Nehru by name and only appealed to the voters to vote for the Congress candidate On behalf of the petitioner Salamat Ali Mehdi (P W 2) and Hussain Ali Shahid (P W 6) however stated that in the meetings which Hafiz Sri Mohammad Ibrahim addressed he named the respondent No 1 as the person for whom people were to vote When Hafiz Sri Mohammad Ibrahim was himself questioned on the point in his second examination he did not deny that he had mentioned the name of Shrimati Shivrajwati Nehru He only said that he did not remember and that his normal practice was to ask for votes for the Congress candidate without naming the candidate Some of the other Ministers like Sri Sampurnanand, the Chief Minister, and Sri Syed Ali Zaheer Minister of Justice and Excise also addressed meetings on behalf of the respondent No 1 and the meetings they attended included the inaugural meeting dated 4th February 1955 which Hafiz Sri Mohammad Ibrahim also attended Sri Sampurnanand the Chief Minister states that he must have said in the meeting that the people must vote for Shrimati Shivrajwati Nehru Syed Ali Zaheer also states that in the meetings he appealed that votes should be cast in favour of the Congress candidate viz Shrimati Shivrajwati Nehru If these other Ministers canvassed for the respondent No 1 by name there appears to be no good reason to think that Hafiz Sri Mohammad Ibrahim did not do the same But even if it be conceded for the sake of

argument that in his addresses he did not name the respondent No. 1 that omission could not, in our opinion, make any difference The meetings he addressed were admittedly held in the constituency from which the respondent No. 1 was a candidate. They were being held for the furtherance of her election prospects They were election meetings called for asking people to vote for her It in such meetings the speaker asked for votes for the Congress candidate without mentioning the candite's name he must be deemed to have asked the electors to vote for the respondent No. 1. On these facts we have no hesitation in coming to the conclusion that Hafiz Sri Mohammad Ibrahim actively worked for the respondent No 1 canvassed for her and addressed election meetings for her

The respondent No 1 took full advantage of what Hafiz Sri Mohammad Ibrahim did. She never repudiated any of his actions She did not enter the witness box to state that Hafiz Sri Mohammad Ibrahim had not worked as her agent or that she had no knowledge about what he had been doing for her On the contrary in paragraph 15(b) of her written statement she admitted that Hafiz Sri Mohammad Ibrahim who was one of the persons mentioned in list 'D' of the petition had canvassed for the Congress candidate, meaning herself, along with the other Ministers mentioned in that list. In these circumstances there can be no doubt that Hafiz Sri Mohammad Ibrahim worked for the respondent No 1 with her knowledge and consent and what ever he did was adopted by her. He was therefore working as her agent in the sense in which the terms is used in election Law

The second ground on which it is argued that Hafiz Sri Mohammad Ibrahim must be held to be the agent of the respondent No 1 appears to be equally strong. It is a well established principle of the law of election that if a candidate has been set up by a party, the party itself as well as its prominent members must be held to be his agents because by agreeing to stand as a candidate of the party he must be deemed to have agreed to the party and its prominent members working to promote his election. In the Bewdley case (3 O'M. & H 145 at page 146) Mr Justice Lopes laid down :—

> "I desire shortly to allude to the position of political associations and the liability of candidates. It was contended that there was no privity between the Respondent and this association, that their active members were not his agents, and that he was not responsible for their illegal acts. There appears to be persons who think that a candidate may escape the responsibility attaching to the acts of an agent by the employment of the active members of a political association, instead of an individual or individual Agents, if this could be done, the Corrupt Practices Act would become a dead letter. There may be, doubtless, in a borough a political association existing for the purpose of a political party, advocating the cause of particular candidate and largely contributing to his success, yet in no privity with the candidate or his agents, an indebendent agency and acting in its own behalf To say that the candidate should be responsible for the corrupt acts of any member of that association, however active, would be unjust, against common sense, and opposed to law There may, on the other hand, be a political association in a borough advocating the views of a candidate, of which that candidate is not a member, to the funds of which he does not subscribe, and with which he personally is not ostensibly connected, but at the same time in intimate relationship with his agents, utilised by them for the purpose of carrying out his election, inter changing communication and information with his agents respecting the canvassing of voters and the conduct of the election, and largely contributing to the result To say that the candidate is not responsible for any corrupt acts done by an active member of such an association would be repealing the Corrupt Practices Act, and sanctioning a most effective system of corruption."

The principle laid down in the above case that if a candidate is adopted by an Asso ciation which makes common cause with him and takes advantage of its machinery for the furtherance of his prospects in the election, he is responsible for the acts of all the pro minent members of the Association, has been followed in numerous election cases decided in India also. The law appears to us to be so well established that we do not consider it necessary to discuss those cases in detail. Some of those cases will be found reported in Agra City (N.M.U.) 1925 L. Budhi Mal *v.* Seth Achal Singh and afterwards Ram Sahai, 1 Hammond's Election Cases page 1, Amritsar City Mohammadan Constituency case, Mohammad Zakaria Kitchlew *vs* Sheikh Mohammad Sadiq (Sen and Poddar's Indian Election Cases page 34), Anglo Indian Constituency (Bengal) case, T. E. Martin *vs.* L. T. Macguire and others (Sen and Poddar's Indian Election cases page 61), Lucknow and Unao Districts Mohammadan Rural Constituency case, Abdul Wali Khan and Habibur Rahman *vs.* Ehtisham Mahmood Ali (Sen and Poddar's Indian Election Cases page 468, Amritsar South (Sikh) Constituency case, Babu Gurdit Singh *vs.* Sardar Partap Singh Kairon (Doabia's Indian Election Cases Vol 1 page 92), Bellary Mohammadan (Rural) Constituency case, S Abdul Razak Sahib Bahadur *vs* Hajee Mohammad Ismail Sahib Bahadur (Deobia's Indian Election Cases Vol. I page 169). Southern Towns (Mohammadan)

Constituency case, Syed Mahmud Shah *vs.* Kh. Ghulam Samad and others, (Doabia's Indian Election Cases Vol. II page 310).

If we look at the facts of the case in hand keeping the law enunciated above in mind we will find that the respondent No. 1 was admittedly a candidate set up by the Congress Party. The Congress Party is one of the chief political parties of this country, which is very well organised and has ample funds and adequate machinery at its disposal to secure the election of any candidate whom it adopts. After the respondent No. 1 was adopted by it as its candidate in the bye-election in dispute the Congress Party did everything it could to further the prospects of the respondent No. 1. The respondent No. 1 admits in her written statement that the prominent members of the Congress Party canvassed for her because she was a candidate of their party. Sri Mahabir Prasad Shukla, the Secretary of the U.P. Congress Committee who has been examined as a witness on behalf of Hafiz Sri Mohammad Ibrahim has also stated that "As Hafiz Sri Mohammad Ibrahim occupies an eminent position among the U.P. Muslims, a general demand was made by all the concerned District Congress Committees that Sri Hafiz should be asked to visit those constituencies and to do propaganda work for the Congress candidates of those consituencies so that the Muslim masses may be attracted." The congress party admittedly spent 2002-5-6 in connection with the election of respondent No. 1 and the amount was included by her in her election expenses *vide* Ex. 43 A and 43 B. The Congress party was therefore actively supporting the respondent No. 1 and working for the furtherance of the prospects of her election.

The entire Congress organisation as an Association therefore became the agent of the respondent No. 1 whom it had adopted as its candidate and all the prominent members of the Congress Organisation also became her agents. Hafiz Sri Mohammad Ibrahim is admittedly a very prominent and active member of the Congress. He is a member of the All India Working Committee of the Congress, A Permanent Invitee to the Pradesh Election Committee, a member of the Exechtive of the Pradesh Congress Committee, member of the Pradesh (Congress) Committee. As such a prominent member of the Congress Organisation of whose influence the respondent No. 1 took full advantage in the bye-election in dispute, Hafiz Sri Mohammad Ibrahim must in law be considered to be her agent.

The learned counsel for Hafiz Sri Mohammad Ibrahim, however, urged in this connection :—

1. that Hafiz Sri Mohammad Ibrahim could not be held to be the agent of the respondent No. 1 because there is nothing to show that he was acting with the knowledge or consent of that respondent. There was actually no privity of contract between Hafiz Sri Mohammad Ibrahim and the respondent No. 1.

2. that even if it be conceded that the Congress as an Association was the agent of the respondent No. 1 because she had accepted its candidature, Hafiz Sri Mohammad Ibrahim was not the agent of respondent No. 1. At the most he could be held to be the agent of the Congress.

3. that even if Hafiz Sri Mohammad Ibrahim be deemed to be an agent of the respondent No. 1 for general convassing on behalf of the Congress he was in any case not her agent when he issued the appeal Ex. 26 in respect of which it is alleged that clause (8) of section 123 of the Representation of the People Act has been contravened.

In putting forward the first contention the learned counsel appears to have overlooked the distinction between agency in common law or in the law of Contract and agency in election law which has already been pointed out and emphasised. As Parker has observed to his Election Agent and Returning Officer, fifth edition, at page 311 :—

> "It is not necessary in order to prove agency to show that the person was actually appointed by the candidate (Harwich, 3 O'M & H. 70); it is sufficient to show the conduct or connection of the parties, the recognition by the candidate of the acts of the person alleged to be an agent or the absence of any disavowal of such acts (see Great Yarmouth, 50 'M & H. 177. The various acts proved to establish agency may each, taken singly be insufficient, and yet, taken as a whole, may be held to prove agency conclusively. Where the agency cannot be distinctly proved, it may be inferred or implied from the acts of the candidate, and from other facts and circumstances) Harwich, 3 O'M & H. 69; Wigan, 4 ib. 10: West Bromwich, 6 ib, 277".

It was therefore not necessary in this case to show that privity existed between Hafiz Sri Mohammad Ibrahim and the respondent No. 1, in the sense in which such privity is required in civil law. When as has already been pointed out Hafiz Sri Mohammad Israhim canvassed for the respondent No. 1, solicited votes for her, addressed her election meetings and full advantage was taken of all his acts and the acts were never repudiated or disowned

by the respondent No 1, it is not possible to say that Hafiz Sri Mohammad Ibrahim was not working as an agent of the respondent No 1 simply because he had not been expressly appointed for that purpose.

It is true that an independent association may work for a candidate and still may not be considered to be his agent It is also possible to contemplate a case in which a certain person may be an agent of a party without being the agent of the candidate getting the support of the party Each case must depend on its own circumstances The question of agency is a mixed question of fact and law and must be decided on the basis of the evidence and circumstances brought on the record keeping in view the general principles of election law In the St George Division Case (50 LM & H 89 at page 97) it was laid down —

> "In determining the question how far a candidate by attending the meetings of political associations makes it or any of its officers his agent, it is necessary first to enquire what is the object and character of the association If, for instance its object be simply to secure the election to Parliament of a particular individual it would be difficult if not impossible for a candidate to take part in its operations without becoming responsible for its acts during the election Again, if the object of the Association be to procure the election of some candidate professing the political views of one of the two great parties which are supposed to divide the opinions entertained by the whole electorate of the country, the candidate if during the election he attended its meetings and availed himself of the assistance the Association would *probably* be held so to sanction the Association acting on his behalf as to constitute the officers of the association his agents '

In the case of Worester (4 O'M & H 103) where that question was whether the Conservative Association which had set up the candidate could be considered to be his agent Baron Pollock laid down —

> "I for one should wish it to be distictly understood that if there be a political association upon the one side or the other whose character is permanent- who from month to month and from year to year are industrious in watching the register correcting it, influencing people to get them names put upon the register and are holding meetings and gatherings for their purpose—modern form of organisation very powerful in the arrangement and the encouragement of a constituency to take any particular view with regard to election that is coming forward, the moment it appears that the candidate or his agent adopts either individually or collectively the work that is done by the Association in such manner as to benefit by its agency quoad the election then I should look upon the sort of organization with very great suspicion and shall be the very first to say that agency has been proved

Particular attention has therefore to be paid in this connection to the character of the Association, the strength of its organization, the extent of its influence, the degree to which it has identified itself with the interest of the candidate and how far a candidate has taken advantage of its activities in furtherance of the prospects of his own election If the matter is considered keeping all these facts in mind it becomes obvious that Hafiz Sri Mohammad Ibrahim worked not only for the Congress but also for the respondent No 1 It is therefore not open to him to say that he was an agent of the Congress only and not of the respondent No 1

It is also not correct to say that Hafiz Sri Mohammad Ibrahim was an agent for a particular purpose only and therefore did not act as an agent of the respondent No 1 when he issued the appeal Ex 26 In her written statement para 11 (d) the respondent No 1 clearly admitted that the appeal in question had been issued for her Sri Sri Krishna who actually issued the appeal to the press also admitted in his statement dated 2nd August 1956 When I sent the appeal to the press I knew that the appeal was being issued for helping Shrimati Shivrajwati Nehru in her election In his previous statement dated 11th February 1956 also Sri Sri Krishna stated that the appeal had been issued in connection with the bye election to the Lucknow District Central Constituency for the Lok Sabha Sri Mahabir Prasad Shukla who persuaded Hafiz Sri Mohammad Ibrahim to issue the appeal also admitted that it was meant for the benefit of the respondent No 1 as well Even as a matter of Law the scope given to the term agency being wider in election matters if Hafiz Sri Mohammad Ibrahim was an agent of Shrimati Shivrajwati Nehru for general canvassing he must be held to be her agent in respect of the appeal which he issued within her knowledge, of which she took full advantage and which she never repudiated

We are therefore clearly of opinion that Hafiz Sri Mohammad Ibrahim was an agent of the respondent No 1 when he issued the appeal (Ex 26)

This alone, however, does not conclude the matter. Even if it be conceded for the sake of arguments that Hafiz Sri Mohammad Ibrahim acted as the agent of the respondent No. 1 when he issued the appeal (Ex. 26) no corrupt practice can be held to have been committed by him unless it is shown that in doing so he (i) obtained or attempted to obtain (ii) assistance other than the giving of votes, (iii) of a person serving under the State of Uttar Pradesh, *viz.*, Sri Sri Krishna, and (iv) for the furtherance of the prospects of the election of respondent No. 1.

On all these points serious controversies of fact and law have been raised on behalf of the parties.

So far as the facts are concerned, the dispute relates to the circumstances in which the appeal (Ex. 26) was issued. The case which the petitioner put forward was that Hafiz Sri Mohammad Ibrahim wrote out the appeal and sent it to Sri Sri Krishna, his personal assistant in order to be issued to the press. Sri Sri Krishna got three copies of the appeal typed out, attested them and issued them to three presses, *viz.*, the Pioneer, the National Herald and the Press Trust of India. The appeal was published in the press the very next day.

On behalf of the respondent, it is not disputed that Sri Sri Krishna was the Personal Assistant of Hafiz Sri Mohammad Ibrahim and was a gazetted Officer serving under the State of Uttar Pradesh. It is also admitted that Hafiz Sri Mohammad Ibrahim wrote out the appeal and got it published. It is said that he wrote out the appeal in his own hand and the original appeal is Ex 26A which is on two leaves. On the second page he wrote out the direction "To be dictated on phone to the P.T.I, the Pioneer and the National Herald". The direction is Ex. 26 B. He then sent it through some peon to Sri Sri Krisha. He (Sri Sri Krishna) first telephoned Sri R. L. Puri, the person in charge of the local branch of the P.T.I. and wanted him to take down the appeal on the phone. Sri Puri, however, told him that he should send a typed copy of the appeal. Sri Sri Krishna then got three copies of the appeal typed out in his office. In the original copy Hafiz Sri Mohammad Ibrahim had not written his designation underneath his signature. In the copies which Sri Sri Krishna prepared he entered the designation 'Minister of Finance & Power'. Under the name below the appeal he wrote the word 'attested' on the copies, signed below the word, gave the date and his own designation 'P. A. to Minister of Finance & Power'. He sent the three copies to the P.T.I, the Pioneer and the National Herald and they were duly published in the papers the next day. Hafiz Sri Mohammad Ibrahim had never directed Sri Sri Krishna either to attest the copies or to get them typed. Sri Sri Krishna got the copies typed and attested them without the knowledge of Hafiz Sri Mohammad Ibrahim. He had also mentioned the designation of Hafiz Sri Mohammad Ibrahim beneath his signature of his own accord without any reference to Hafiz Ji. He put down the designation as that was his usual practice. The original appeal Ex. 26 remained with Sri Sri Krishna in his office. After the appeal was published in the press, the petitioner sent a complaint to the Returning Officer along with a copy of the appeal In that complaint he had made a grievance of the fact that Government servants were openly taking part in the bye election and had referred to the appeals an example. Copies of this complaint had also been sent to the Election Commission of India and the Chief Electoral Officer, U.P. and the Minister for Finance and Power, U.P. for information and necessary action. The Chief Electoral Officer was Sri J K. Tandon. On getting the copy (Ex. X) he phoned in the office of Hafiz Sir Mohammad Ibrahim and he sent for the original manuscript which was duly sent to him. He then prepared a note, a copy of which is Ex. X/1 and sent that note to Hafiz Sri Mohammad Ibrahim and The Chief Minister. Subsequently, the Secretary of the Election Commission, India, sent a copy of the complaint (Ex. X/2) to the Chief Secretary to the U P. Government and a reply was sent to the Secretary Election Commission, India in due course. The original appeal (Ex. 26A) written out by Hafiz Sri Mohammad Ibrahim remained in the secretariat file which contained the original note (Ex. X/1) and was produced before the Tribunal by Sri J. K. Tandon on 9th July 1956 when it was summoned from him at the instance of Hafiz Ji.

The petitioner does not admit the correctness of the above version. It is suggested on his behalf that Ex. 26 A is not really the original appeal which had been written out by Hafiz Sri Mohammad Ibrahim and that on the original appeal there was no endorsement like Ex. 26 B. The original appeal had been written and handed over to Sri Sri Krishna in order that its attested copies should be issued to the press. Sri Sri Krishna got it typed and attested them and issued the copies to the Pioneer, the National Herald and the P.T.I. When Sri Sri Krishna was examined first as the petitioner's witness on 14th February 1956 he was asked about the original of the appeal and he stated that he did not remember what he had done with it. He added that he may have destroyed it or it may be lying in his office. Subsequently, when notice under section 99 of the Representation of the People Act were issued to Hafiz Sri Mohammad Ibrahim and Sri Sri Krishna they felt it necessary that some case should be set up on the basis of which Hafiz Sri Mohammad Ibrahim could claim exoneration from liability and the responsibility for

getting the copies typed, for attesting the same and for issuing them to the press may be put on the shoulders of Sri Sri Krishna Ex 26-A was thereupon written and on its back was written the direction that the appeal should be issued to the P T I., the National Herald and the Pioneer on the phone This freshly written document was thereafter summoned from Sri J K Tandon and filed by him at the instance of Hafiz Sri Mohammad Ibrahim.

Apart from this controversy about facts, the parties appear to be at great variance from each other on questions of law also.

It is contended on behalf of the respondent that even if all the allegations made by the petitioner in his petition about the publication of the appeal be accepted Hafiz Sri Mohammad Ibrahim cannot be considered to have committed a corrupt practice as contemplated by clause (8) of section 123 of the Act as,

(1) What Hafiz Sri Mohammad Ibrahim did could not amount to 'obtaining' or 'attempting to obtain' any assistance. The word 'obtain' as used in section 123 (8) presupposes some conscious effort, and cannot be held to be synonymous with 'get'. In the present case no such conscious effort can be held to have been present on the part of Hafiz Ji

(2) What Sri Krishna did in the circumstances cannot be considered to be 'assistance' He was a subordinate of Hafiz Ji and only did what any person in his position could do in the circumstances

(3) In getting the appeal typed and issuing it to the press Sri Krishna only carried out his normal duties as a P A as laid down in paragraph 24 of the Secretariat Manual, 1953, which he could not refuse

(4) That before section 123 (8) can apply a sort of subjective element must be present even in the person who is said to be rendering the assistance. If this is not insisted upon the candidates in an election will be deprived of the use of the normal machinery of the Government like the Post & Telegraphs Department and the railways Even if a candidate wrote an appeal on postcards and posted them in the letter box and the postal authorities conveyed the postcards to the persons for whom they were meant, it could be said that the candidate had obtained the assistance of the postal authorities serving under the Government This could never have been the intention of enacting section 123 (8) This subjective element was not present in the case of Sri Sri Krishna

(5) Sri Sri Krishna had two capacities There was his private capacity and there was his capacity as a person serving under the Government The case can be brought within the mischief of section 123 (8) only if the assistance of Sri Sri Krishna was obtained in his capacity as a person serving under the Government If he did something in his personal capacity no reasonable objection could be taken to it.

(6) That what Hafiz Sri Mohammad Ibrahim or Sri Sri Krishna is alleged to have done cannot be held to have been done to further the prospects of the election of the respondent No 1

(7) That section 123 (8) could not apply because Hafiz Sri Mohammad Ibrahim had not obtained the assistance of Sri Sri Krishna because the latter was a Government servant

(8) That Hafiz Ji could be held to have committed a corrupt practice only if it was established that he had some corrupt motive or intention That is not the case of the petitioner even

Against these contentions it is urged on behalf of the petitioner that,

(1) That the word 'obtain' has not been defined in the Representation of the People Act. According to Ramanatha Aiyer's Law of Lexicon, it means "to get hold· to get possession of, to acquire, to maintain a hold upon, to keep, to possess, to secure". According to Oxford Dictionary it means "acquire, secure, have granted; get" According to the Chambers 20th Century Dictionary, it means "to get· to procure by effort to gain; to reach, to hold, to occupy The Legislature must be presumed to have used the word in its ordinary prevelent sense and not as a term of art, the Ordinary sense which the word conveyes is "to get or secure" and that should be the meaning that is to be attached to the word If that is done, it cannot be seriously contended that when Hafiz Sri Mohammad Ibrahim asked Sri Sri Krishna to dictate the message on the Phone and the latter complied with his wishes and acted according to his directions Hafiz Ji did not "secure or get" the assistance of Sri Sri Krishna What Hafiz Ji did in that connection was not done automatically or mechanically but was the result of a conscious effort, however small or insignificant that effort may have been In the case of Ram Krishna *vs* the State (1956 S C page 476) the word 'obtain' was interpreted by their Lordships of the Supreme Court

as including "passive receipt of what was offered as well as a receipt by soliciting payment or extortion by threat or coercion."

(2) The word 'assistance' has also not been defined in the Representation of the People Act. The dictionary meaning of the word is "aid or help". Section 123 (8) does not prescribe or otherwise describe the mode of disqualifying assistance. The obtaining of any assistance, therefore, for the purpose mentioned in the section must be held to be disqualifying. When Sri Sri Krishna carried out the instructions of Hafiz Ji and did all he could to attain the purpose which Hafiz Sri Mohammad Ibrahim had in mind while issuing the appeal, he must be held to have rendered 'assistance'.

(3) The duties of Sri Sri Krishna as a P.A could not include the getting of an appeal issued by Hafiz Ji as a political leader typed, or sending it out to the press. According to para 24 of the Secretariat Manual, 1953, all the duties which a personal assistance is expected to carry out are duties connected with the official position of the Minister concerned. He has nothing to do with his private or unofficial matters. It is certainly open to a personal assistant to voluntarily deal with the personal or non official correspondence of the officer whom he serves but in doing so he cannot be said to be performing his official duties. He only does so either to please the person under whom he is serving or because he feels that he cannot afford to disobey his superior.

(4) Even if a subjective element is considered to be necessary in the person who renders assistance, in the present case it cannot be said that Sri Sri Krishna when he acted as he is alleged to have acted did not have that subjective element. He is an educated person. He was a gazetted officer. When the appeal was sent to him he read it. He must have come to know for what purpose it was being issued. He must have also understood that if it was sent to the press it will go a long way to help the candidate for whom it had been written. Though he had been directed to dictate the appeal on phone he found that for certain reasons that was not possible. He, therefore, exercised his own discretion and decided to get three copies typed, to attest the same and even to add the designation of Hafiz Ji in order to add to the importance of the appeal and to make it more acceptable. He then issued the three copies to the three presses. In these circumstances it cannot be said that a subjective element was not present in what Sri Sri Krishna did. A postal official who arranges for the distribution of the postcards containing an appeal by a candidate does so without the knowledge of the contents; the railway which carries a candidate from one place to another carries him like an ordinary passenger without having any idea of the purpose with which he is travelling. Sri Sri Krishna cannot be said to have acted in a similar manner.

(5) It is not correct to say that for the purpose of section 123 (8) a person serving under the Government can act in his private capacity apart from his capacity as a Government servant. If that is allowed, the entire purpose of the clause is likely to get defeated and it will become permissible for a Government servant to render all possible help to a candidate simply by alleging that he was doing so in his private capacity and not in his capacity as a Government servant.

(6) The appeal had been issued to exhort the voters to vote for the Congress candidates. Hafiz Ji had been requested to issue the appeal because it was considered that he had a hold on the Muslim masses and his appeal would create an effect on them favourable to the Congress candidates including the respondent No. 1. But for the assistance of Sri Sri Krishna the appeal may not have been published in the press at the time when it was actually published. The purpose for which the appeal was issued was, therefore, the bettering of the prospects of the congress candidates including the respondent No. 1. Under section 123 (8) of the Act it is not necessary that the prospects of the candidate's election must actually have been furthered by the assistance obtained for that purpose from a person serving under the Government. The case will fall within the mischief of the provision if the candidate or his agent obtains the assistance of the person for that purpose. If the purpose for which the appeal was published was to further the prospects of the respondent's election, the assistance of Sri Sri Krishna must be held to have been obtained for that purpose.

No importance can be attached to the fact that the respondent No. 1 was not mentioned by name in the appeal (Ex. 26-A). It cannot on that account be said that the appeal had been issued in furtherance of the prospects of her election to but in furtherance of the prospects of the Election of the Congress in general. It cannot be overlooked in this connection that Hafiz Sri Mohammad Ibrahim admittedly worked for the respondent No. 1. He addressed inaugural meetings of her election compaign. He attended other meetings too and exhorted voters to vote for her. Four bye elections were going to be held at the time when the appeal was issued and one of them was the bye election in dispute. The respondent No. 1 had been unanimously adopted as a candidate of the Congress for the Lucknow District Central Constituency. The appeal had been issued at Lucknow and was published in three papers of the city. There were a large number of Muslims voters in the Constituency and Hafiz Sri Mohammad Ibrahim had been particularly

approached to issue the appeal so that those voters might vote for the Congress candidates including the respondent No 1 The appeal was therefore meant for the benfit of respondent No 1 also

(7) There may be some justification for the view that for the application of clause (8) of section 123 some subjective element is necessary not only in the persons who takes the assistance but also in the person who renders it But there appears to be no warrant for the supposition that the section can apply only if the assistance of the person concerned is obtained as a Government servant The supposition ignores the very purpose for which section 123 (8) appears to have been enacted As was laid down in the case of Raj Krushna Bose *v* Binod Kanungo & others, 9 Election Law Reports 294 at page 298

> "The policy of the law is to keep Government servants aloof from politics and also to protect them from being imposed on by those with influence or in positions of authority and power, and to prevent the machinery of Government from being used in the furtherance of a candidate's return

The purpose of the enactment, therefore is to prevent candidates or their agents from getting any advantage of the machinery of the Government for the furtherance of their own election prospects, and also to prevent Government servants from getting involved in politics If, therefore, a candidate deliberately gets something done in furtherance of his own election prospects by a person whom he knows to be a Government servant and the person renders assistance knowing full well that by doing that he is likely to further the prospects of the candidate's election he cannot escape responsibility simply by alleging that the assistance was not rendered by the person concerned as a Government servant In Shibban Lal's case, reported in X Election Law Reports 126 their Lordships of the Supreme Court set aside the election only because some mukhias (who were persons serving under the Government) had canvassed for the candidate They apparently did not countenance the argument that the canvassing had been done by the persons concerned otherwise than as Government servants

It has been held that Government servants can nominate or second a candidate (6 Election Law Reports 99 Suram Singh *vs* Waryam Singh & others) or can work as polling agents (6 Election Law Reports 414, Satya Dev Bushahri *v* Padam Dev & others and 7 Election Law Reports 420 Maharaj Singh *vs* Ratan Amol Singh & others) But that has been held to be permissible because acting as polling agents or signing the nomination form does not amount to furthering the election prospects of any particular candidate In those very cases it has been laid down that if in addition to signing the nomination papers or acting as polling agents the Government servant in question does anything more he is sure to fall within the mischief of section 123 (8) of the Act It is obvious that what Sri Sri Krishna did in the present case cannot stand on the same footing as signing a nomination papers or acting as a polling agent What he did gave an advantage to one of the candidates in preference to the others and was not therefore an innocous act

(8) In clause (8) of section 123 of the Act there is nothing to suggest that any particular knowledge or intention is necessary for doing a corrupt practice contemplated by that clause It is therefore not permissible to introduce in the section something which is not there and to say that a particular kind of intention is a necessary ingredient of the clause In 1 O'M & H 16 at page 19 (The Bewdley case) a similar contention raised with reference to the English Act was repelled with the observations

> "As to this word 'corruptly' the true construction of the Act is that which was stated by Mr Justice Willes in giving his opinion in the House of Lords in the case Cooper *v* Slade, namely, that 'corruptly there does not mean wickedly, or immorally, or dishonestly or anything of that sort, but with the object and intention of doing that which the Legislature plainly means to forbid

Section 123 (8) forbids the obtaining of the assistance of a person serving the State for a particular purpose and if such assistance is intentionally obtained a breach of the law is committed Whether the intention with which it was obtained was good or bad evil or innocent, appears to be entirely immaterial

The rival contentions raised serious and important questions of fact and law We therefore, heard the learned counsel for the parties at length in support of their respective contentions As we were invited to record a finding that a major corrupt practice had been committed by Hafiz Sri Mohammad Ibrahim and Sri Sri Krishna and to name them as persons who had committed it in accordance with the proviso to section 99 of the Act we issued notices to the said persons calling upon them to show cause why they should not be so named They filled their written statements They did not consider it necessary to recall any of the witnesses already examined but produced evidence in support of their respective cases Their learned counsel addressed us at great length At one stage, the learned counsel for Sri Hafiz Mohammad Ibrahim raised a question of jurisdiction and urged that in view of Article 192 of the Constitution this Tribunal had no jurisdiction to go into the question whether Hafiz Sri Mohammad Ibrahim, who was a sitting member of

the U.P. Legislature, had committed a major corrupt practice or not We did not find any force in that contention and by our order dated the 20th September, 1956, over ruled it The order passed by us in that connection is annexed to this judgment as annexure 'A' and must be considered to be a part of it A writ petition under Article 226 of the Constitution was then filed in the Hon'ble High Court on behalf of Hafiz Sri Mohammad Ibrahim and it was praved that our order be quashed as it was not justified in law. It was also contended that in any case the facts alleged by the petitioner against Hafiz Sri Mohammad Ibrahim did not in law constitute a corrupt practice as contemplated by clause (8) of section 123 of the Act By its judgment dated the 21st of December, 1956, reported in Hafiz Md Ibrahim vs. Election Tribunal 1957 Allahabad (A I R) 292 the Hon'ble High Court upheld our view that the Tribunal alone had jurisdiction to deal with the matter and was not bound to refer to the Governor under Article 192 of the Constitution the question whether a major corrupt practice had been committed by Hafiz Sri Mohammad Ibrahim as alleged It, however accepted the other contention of Hafiz Sri Mohammad Ibrahim and holding that the facts alleged against him did not amount to a corrupt pratice has by a writ of prohibition directed this Tribunal to forbear from proceeding further with the inquiry into the question whether Hafiz Sri Mohammad Ibrahim was guilty of a corrupt pratice as alleged in the notice that was issued to him on the 14th of June, 1956, under section 99 of the Act. It is not for us to go into the question how if the Tribunal alone had jurisdiction to decide the matter it could be decided by anyone else The decision of the Hon'ble High Court has however relieved us of the necessity of inquirying how far the contentions urged on behalf of the petitioner in this connection were well founded, and of recording our own finding as to whether a major corrupt practice was committed by Hafiz Ji or not The writ of prohibition issued to us by the Hon'ble High Court on this point is binding on us and we must in accordance with it refrain from recording any finding of our own on the question

So far as the case of Sri Sri Krishna is concerned, if as has been held by the Hon'ble High Court that Hafiz Sri Mohammad Ibrahim did not commit any corrupt practice, it follows *a fortiori* that Sri Sri Krishna too cannot be held to have committed any corrupt practice in that connection The only thing that was urged on behalf of the petitioner about him was that if he worked as agent of Hafiz Sri Mohammad Ibrahim, who himself was an agent of the respondent No 1, he (Sri Sri Krishna) became the sub agent of respondent No. 1 A sub agent is as much an agent as the agent himself As a sub agent Sri Sri Krishna issued the appeal Ex 26A to the presses for the furtherance of the prospects of the election of respondent No 1 He thus obtained the assistance of a person serving under the State Government, *viz*, himself and therefore a fell within the mischief of section 123 (8) of the Act. This case was, however, not seriously pressed before us and in the petition it was never allegal anywhere that Sri Sri Krishna was also an agent of the respondent No 1. In view of the definition of the term agent as given in section 79 of the Act knowledge or consent of the candidate is necessary before a person can be held to be his agent and an officious person who works of his own accord has never been considered to be an agent In the case of Sri Sri Krishna nothing has been brought to our notice on the basis of which we can hold that the respondent No 1 had any knowledge of what Sri Sri Krishna did or that she ever consented to what he had done From the circumstances it appears to be obvious that she could not have had any knowledge about the part he played in the affair We are therefore, not prepared to hold that Sri Sri Krishna was an agent of the respondent No. 1 on account of being a sub agent and if he was not an agent there can be no question of his obtaining his own assistance as an agent for the furtherance of the prospects of the election of the respondent No 1. It is interesting to note in this connection that under section 123 (8) of the Act, a person serving under the State himself does not commit a corrupt practice by giving assistance. It is only the candidate or his agent who commits the corrupt pratice if he obtains the assistance of persons serving under the State Sri Sri Krishna therefore, cannot be said to have committed any major corrupt practice

In respect of issues Nos. 3 and 4, therefore we are of opinion that the Ministers mentioned in list 'D' are not proved to have abused their position by using State cars driven by chaufeurs employed by the State or by canvassing voters or coercing them for giving their votes to the respondent No 1 Out of the Ministers mentioned in list 'D' Dr. Sampurna Nand, Syed Ali Zahir Sri C B Gupta, Sri Har Govind Singh and Sri Girdhari Lal are not proved to have employed any person serving under the Government for any purpose. The Hon'ble High Court has held that Hafiz Sri Mohammad Ibrahim did not commit any corrupt practice when he got the appeal 26 A issued to the Press through his P A Sri Sri Krishna. Sri Sri Krishna himself also did not commit any such corrupt pratice These issues are decided accordingly

Issue No 6 In view of what we have said above the petition must fail

Before we conclude we must in fairness to ourselves and that when the case was still being argued before us on the 1st of October 1956 the Hon'ble High Court directed us by its order dated the 28th of September, 1956, that though arguments may be concluded

judgment should not be pronounced till the disposal of the writ petition (Civil Miscellaneous Application No 223 of 1956) The arguments were concluded on the 6th of October, 1956 The writ petition was dismissed on the 21st December 1956 But before judgment could be delivered a fresh stay order was communicated to us in March, 1957, as an application for leave to appeal to the Supreme Court against the order of the 21st December, 1956, was filed This stay order was discharged in the first week of May, 1958 Then the High Court Vacation intervened and we are thus able to deliver judgment in the case only today

ORDER

The petition is accordingly dismissed under section 98 (a) of the Act

Under section 99 of the Act there being a charge in the petition of a major corrupt practice having been committed we record

(a) (1) No major corrupt practice has been committed by any of the candidates personally So far as the workers and agents of the candidates are concerned the Hon'ble High Court is of opinion that Hafiz Sri Mohammad Ibrahim did not commit any corrupt practice when he got the appeal (Ex 26 A) issued to the press through his personal assistant and has by a writ of prohibition restrained us from proceeding to inquire into the matter The other workers and agents have not been proved to have committed any corrupt practice

(ii) No person can in the circumstances be named as having committed any corrupt practice

(b) The petitioner will bear his own cost and pay to the respondent No 1 her costs which we assess at Rs 500 The other respondents will bear their own costs

The notices we issued on the 14th June, 1956 to Hafiz Sri Mohammad Ibrahim and Sri Sri Krishna stand discharged But in the circumstances of the case we think it will be fair if they are left to bear their own costs We order accordingly

LUCKNOW;
The 18th August, 1958.

Read by—Vishnu Pd.
Heard by.—Maqbool Ahmad

(Sd) AMBIKA PRASAD SRIVASTAVA,
Chairman,
Election Tribunal, Lucknow

(Sd) K C SRIVASTAVA,
Member,
Election Tribunal, Lucknow

(Sd) S N ROY,
Member,
Election Tribunal, Lucknow.

ELECTION PETITION NO 2 OF 1955

ANNEXURE 'A'

ORDER

On the 14th of June 1956 this Tribunal issued a notice under section 99 of the Representation of the People Act to Hafiz Sri Mohammad Ibrahim Minister of Finance and Power, Uttar Pradesh, Lucknow in the following terms—

"To

Hafiz Sri Mohammad Ibrahim, Minister for Power and Finance, U.P Government, Lucknow Camp Naini Tal

Whereas in the present case there being a charge of a major corrupt practice having been committed at the Bye Election in dispute it is necessary for us under sec 99 of the Representation of the People Act to record a finding whether any major corrupt practice has or has not been proved to have been committed by or with the Connivance of the respondent No 1 or her agents at the Election We also have to name all persons who have been proved at this trial to have been guilty of the alleged major corrupt

practice and to judge the nature of the corrupt practice. We have also to consider whether there are any grounds for exempting these persons from any disqualifications which they may have incurred in this connection under sec. 141 to 143 of the Act. The proviso to the Section, however, requires that no person shall be named in the manner indicated above unless he has been given a notice to appear before the Tribunal and to show cause why he should not be so named. If he appears in pursuance of the notice, he has to be given an opportunity of cross examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence in his defence and of being heard and whereas we heard the learned counsel for the petitioner and the respondent No. 1 on the question that arose in connection with the application of sec. 99 of the Representation of the People Act to the present case and whereas after hearing everything which they had to say it is our agreed opinion that under the aforementioned section notice should be issued in the case at least to you requiring you to appear before this Tribunal and to show cause at this very stage.

You are therefore required under sec. 99 of the Act to appear before us on the 27th (twenty-seventh) day of June, 1956 at 10-30 a.m. in the court of the District Judge, Lucknow, to show cause why you should not be named in the order of the Tribunal as having committed the corrupt practice mentioned below.

Given under my hand and the seal of the Tribunal this 14th day of June, 1956.

Corrupt Practice,

That you as agent of Sm Shivrajwati Nehru, respondent no 1 obtained or procured or attempted to obtain and procure the assistance of your Personnal Assistant Sri Sri Krishna, a person serving under the Government of the State of U.P. for the furtherance of Sm. Shivrajwati Nerhu's election by getting your appeal (copy of which is Ex. 26) typed, attested and issued to the Press.

A similar notice was issued to Sri Sri Krishna, the Personal Assistant. Both the persons above-mentioned filed their written statements. Hafiz Sri Mohammad Ibrahim then examined himself on commission, got some documents produced and made an application that he would examine four witnesses The case was taken up on 2nd August, 1956. The learned counsel for the petitioner then stated his case in respect of the major corrupt practices having been committed by the two opposite parties. The learned counsel for the opposite party no. 1 then stated the case of Hafiz Sri Mohammad Ibrahim. He also stated the case of Sri Sri Krishna as brief holder of Ch. Niamatullah and began to produce evidence. Sri Sri Krishna examined himself on his own behalf and then closed his case. The evidence for Hafiz Sri Mohammad Ibrahim then began and three witnesses were examined. After the evidence of the third witness, Sri J. K. Tandon, had been recorded. Sir Iqbal Ahmad raised a point of jurisdiction and contended that he reserved his right to produce further evidence in the case and wanted to point out that this Tribunal had no jurisdiction to proceed against his client Hafiz Sri Mohammad Ibrahim. In view of Art. 192 of the Constitution of India this Tribunal was bound to refer the matter to the Governor In his own words the contention put forward by Sri Iqbal Ahmad is this:—

> "At this stage Sir Iqbal Ahmad counsel for Hafiz Sri Mohammad Ibrahim urged that he wanted to produce the rest of the evidence on behalf of his client not before this Tribunal at present and wanted to reserve it for being produced before the Governor. His contention is that his client Hafiz Sri Mohammad Ibrahim is a sitting member of the Legislative Assembly and, as in view of the notice issued to him, the question has arisen as to whether Hafiz Sri Mohammad Ibrahim has become subject to any of the disqualifications mentioned in clause (1) of Art. 191 of the Constitution that question must, in view of the provisions of Art. 192 of the Constitution, be referred to the decision of the Governor. In view of the said provision this Tribunal has no jurisdiction to record any finding as to the charge set out at the foot of the notice served on Hafiz Sri Mohammad Ibrahim."

The question raised being of importance we heard Sir Iqbal Ahmad as well as the learned counsel for the petitioner in respect of it, and reserved orders. Subsequently Sri Kanhaiya Lal Misra on behalf of Sm. Shivrajwati Nehru, the respondent no. 1 and Sri Niamatullah on behalf of Sri Sri Krishna made a representation that their clients too were interested in the question and may be affected by the decision arrived at by the Tribunal on it. They therefore prayed that they should also be given an opportunity of making their representations in that connection We accepted their request and heard them at length.

They approached the question from slightly different angles of view but substantially supported Sir Iqbal Ahmad in his contention that the question whether Hafiz Sri Mohammad Ibrahim, a sitting member of the U P. Legislative Assembly, had committed a major corrupt practice as defined in sec. 123(8) of the Representation of the People Act (here-

inafter to be referred to as the Act) was intimately connected with the question whether on account of the commission of that corrupt practice he stood disqualified from remaining a member of the Legislative Assembly of the State. It was therefore necessary for the Tribunal at this very stage to refer both the questions to the Governor and await his decision which was to be final under Art. 192 of the Constitution.

In order to appreciate the contention pressed by the learned counsels it is necessary to survey, briefly, the provisions of the Constitution and the Act on which the contentions appear to be based. While quoting the various provisions we will leave out the words unnecessary for our present purposes.

Under Art. 191(1) of the Constitution:—

"A person shall be disqualified for being chosen as and for being a member of the Legislative Assembly or Legislative Council of a State.....
(e) if he is so disqualified by or under any law made by Parliament."

A law made by Parliament as contemplated by clause (e) of Art. 191 of the Constitution is to be found in sec. 7 of the Act which lays down:—

"A person shall be disqualified for being chosen as and for being a member of Parliament or of the Legislative Assembly or Legislative Council of a State—

(a) if, whether before or after the commencement of the Constitution, he has been convicted, or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty of any offence or corrupt or illegal practice which has been declared by section 139 or section 140 to be an offence or practice entailing disqualification for membership of Parliament and of the Legislature of every State, unless such period has elapsed as has been provided in that behalf in the said section 139 or section 140, as the case may be;"

According to sec. 140(1) of the Act:—

"(1) The following corrupt or illegal practices relating to elections shall entail disqualification for membership of Parliament and of the Legislature of every State, namely:—

(a) corrupt practices specified in section 123 or section 124, and

(b) illegal practices specified in section 125.

(2) The period of such disqualification shall be six years in the case of a corrupt practice, and four years in the case of an illegal practice, counting from the date on which the finding of the Election Tribunal as to such practice takes effect under this Act."

Under Article 192 of the Constitution:—

"(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

Article 190 of the Constitution provides in clause (3) as follows:—

"(3) If a member of a House of the Legislature of State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of Article 191, or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant."

Sec. 150 of the Act runs as follows:—

"(1) When the seat of a member elected to the Legislative Assembly of a State becomes vacant or is declared vacant or his election to the Legislative Assembly is declared void, the Election Commission shall, subject to the provisions of sub-section (2), by a notification in the Official Gazette, call upon the Assembly constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification, and the provisions of this Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy.

The above provisions from one set of provisions relating to the disqualification of a sitting member of the Legislative Assembly or Legislative Council of State and its consequences.

Under Article 324 of the Constitution the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State held under the Constitution, is the responsibility of the Election Commission. If however any "doubts or disputes" arise out of or in connection with the election to Parliament or to the Legislatures the Election Commission cannot decide "the doubts and disputes" itself but must appoint an Election Tribunal for their decision. The appointment of such a Tribunal is one of the duties of the Election Commission.

Under Article 328:—

"Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

Article 329 (b) of the Constitution however provides:—

"Notwithstanding anything in this Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

An election petition has to be presented according to sec. 80 of the Act. According to sec. 83 of the Act it must contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of the pleadings. It shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal practice which the petitioner alleges, including as full a statement as possible as to names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice. An Election Petition, if filed, has to be referred to a Tribunal for disposal unless it is dismissed by the Election Commission itself. According to sec. 90 of the Act the procedure which the Tribunal has to follow is as nearly as may be the procedure applicable under the C.P.C. to the trial of suits. After the trial of an election petition is over, section 98 of the Act provides as follows:—

"At the conclusion of the trial of an election petition the Tribunal shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of the returned candidate to be void; or

(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or

(d) declaring the election to be wholly void."

Section 99 of the Act then lays down:—

"(1) At the time of making an order under sec. 98 the Tribunal shall also make an order—

(a) Where any charge is made in the petition of any corrupt or illegal practice having been committed at the election, recording

(i) a finding whether any corrupt or illegal practice has or has not been proved to have been committed by, or with the connivance of, any candidate or his agent at the election and the nature of that corrupt or illegal practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice and the nature of that practice, together with any such recommendations as the Tribunal may think proper to make for the exemption of any persons from any disqualifications which they may have incurred in this connection under sections 141 to 143; and

(b) fixing the total amount of costs payable, and specifying the persons by and to whom costs shall be paid;

Provided that no person shall be named in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before the Tribunal and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice he has been given an opportunity cross-examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence in his defence and of being heard.

(2) Any order as to costs under clause (b) of sub-section (1) may include a direction for the payment of costs to the law Officer attending the trial in pursuance of any requisition of the Tribunal under sec. 89."

According to section 103 of the Act the Tribunal shall after announcing the orders made under sections 98 and 99, send a copy thereof to the Election Commission. According to section 105 the order of the Tribunal is to be final and conclusive. Under section 106 the Election Commission is to forward copies of the order to the appropriate authority and to cause it to be published in the Gazette of India or in the Official Gazette of the State concerned. The order of the Tribunal passed under sections 98 and 99 of the Act shall not however, take effect until it is published in Gazette of India or in the Official Gazette of the State concerned according to sec. 106.

Now the contention of Sir Iqbal Ahmad on behalf of Hafiz Sri Mohammad Ibrahim appears to be that his client is a sitting member of the Legislative Assembly of the U.P. State. It is alleged on behalf of the petitioner that he as an agent of the respondent no. 1 has committed a major corrupt practice as defined in sec. 123 (8) of the Act. If this allegation is accepted by this Tribunal, under sec 7 (a) of the Act read with Art. 191 (1) (e) of the Constitution he will automatically become disqualified for being a member of the Legislative Assembly and under clause (3) of Art. 190 of the Constitution as soon as he becomes subject to that disqualification his seat in the Assembly shall become vacant and a bye-election must be held under sec. 150 of the Act. Art. 192 of the Constitution creates an exclusive jurisdiction in the Governor of the State to decide the question whether Hafiz Sri Mohammad Ibrahim has or has not become subject to the disqualification mentioned in sub-clause (1) (e) of Art. 191 of the Constitution or sec 7 (a) of the Act. Art. 192 of the Constitution makes the decision of the Governor final, though in arriving at the decision the Governor is bound to follow the advice he receives on the matter from the Election Commission. The question having arisen whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice and has on that account become disqualified from membership of the U.P. Assembly must therefore be referred to the Governor. This Tribunal has no jurisdiction to go into the question. The reference must be made at this very stage because if a finding on the point is recorded by the Tribunal, the mischief will have been done and Hafiz Sri Mohammad Ibrahim will stand unseated without the decision on the question of the person who has the sole right to decide it.

According to Sir Iqbal Ahmad the question of his client having committed a major practice as defined in sec. 123 (8) and the question of his being disqualified on that ground for remaining a member of the Legislative Assembly are inextricably connected with each other, and the one cannot be dealt with apart from the other. It is, therefore, not possible for this Tribunal to go into the question whether Hafiz Ji has or has not committed a major corrupt practice and to arrive at a conclusion in the matter and then leave it to the Governor to decide whether on that account he has become disqualified or not. As this Tribunal has no jurisdiction to consider the question of disqualification it has no jurisdiction to go into the question whether the sitting member has committed a major corrupt practice or not. As under Art. 192 of the Constitution the decision of the Governor about the disqualification is to be final, this Tribunal after referring the question to him must wait for his decision and after receiving it act in accordance with it. If, urges Sir Iqbal Ahmad, the way suggested by him is followed there would be no question of there being any conflict between sec. 99 of the Act and Art. 192 of the Constitution. His alternative contention, however, is that if this Tribunal is of opinion that there is any conflict between the two provisions, it is in the first place bound by the provisions in the Constitution which must prevail over any other law and if even that is not possible this Tribunal must hold that sec. 99 of the Act is not *intra-vires* and refer the question of its being *ultra-vires* for decision to the Hon'ble High Court under sec. 113 C.P.C. because that court alone has jurisdiction to declare the provision as unconstitutional.

Chaudhri Nimatullah on behalf of Sri Sri Krishna, supported the contention of Sir Iqbal Ahmad that the reference ought to be made by the Tribunal to the Governor under Art. 192 of the Constitution and that it had to be made at this very stage and at no other. He however, conceded that under section 99 of the Act this Tribunal had jurisdiction to record a finding as to whether any major corrupt practice had been committed or not and also to name the persons who committed it. He however said that that finding was to be recorded after the decision of the Governor under Art. 192 of the Constitution has been made

and was to be in accordance with it According to him the question whether Hafiz Sri Mohammad Ibrahim, a sitting member of the U.P. Legislative Assembly, had become subject to a disqualification arose as soon as it was alleged by the petitioner in his election petition that Hafiz Ji had committed a major corrupt practice and the question should have been referred to the Governor at that very time.

Sri Kanhaiya Lal Misra on behalf of the respondent No. 1 conceded at the very outset that the relevant provisions of the Constitution and the Act being read together created two tribunals of *independent exclusive jurisdiction*. One was the Election Tribunal which had to decide all "doubts and disputes" regarding an election including the question whether any corrupt practice had been committed or not and the Tribunal also possessed the jurisdiction to name all persons whether they were sitting members of the Legislative Assembly or not, if they were found to have committed any corrupt practice and illegality. At the same time the question whether or not a sitting member had become subject to a disqualification mentioned in Art. 191 (1) (e) of the Constitution read with sec. 7 (a) of the Act was to be decided by the Governor and the Governor alone The Tribunal or any other body had no right to go into the question If properly interpreted, he said, the two provisions were not irreconcilable and the best way of reconciling, then was for the Tribunal to stay its hands at the present stage and refer the question of disqualification to the Governor for decision. After his decision was received the Tribunal could proceed to decide the questions which it was bound to decide under sec 99 of the Act. On the point whether a disqualification had been incurred or not, the decision of the Governor was final and binding on everyone including the Tribunal. On the connected question whether Hafiz Sri Mohammad Ibrahim had committed a corrupt practice or not it will be open to the Tribunal either to accept the finding of the Governor to arrive at its own conclusion. The Tribunal could therefore after receiving the decision of the Governor under Art. 192 of the Constitution proceed to do its duty laid down in Sections 98 and 99 of the Act and its orders will have their own effect in due course. He however agreed with Sir Iqbal Ahmad and Chaudhri Niamatullah that as the finding about a corrupt practice having been committed by Hafiz Sri Mohammad Ibrahim automatically disqualified him from remaining a member of the Legislative Assembly, this Tribunal was not entitled to go into the question whether the corrupt practice had been committed or not or to record any finding about it before the Governor had decided the question of disqualification. This Tribunal was therefore bound to refer the matter to the Governor and to await his decision before proceeding further.

The reply of Sri S. P Sinha, counsel for the petitioner is three-fold. He urges in the first place that the two questions whether a major corrupt practice had been committed or not and whether as a result of it any disqualification would or would not be incurred are really different and independent questions. The second question will arise only after the first is answered. Till the first question is answered the second question will not arise at all. Thus if it is found that no major corrupt practice has been committed there would be no question of any disqualification having been incurred. It is only after a finding has been recorded that Hafiz Ji has committed a major corrupt practice that the question will arise whether on account of that finding he has become disqualified or not. When that question arises it may have to be referred to the Governor but that stage has not yet arrived. It is for this Tribunal to decide the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice or not. It is bound to record a finding of its own on the point. It cannot delegate that duty to any other body. It will not be the concern of the Tribunal as to what consequences follow from that finding. The Tribunal will cease to function after passing the orders contemplated by sections 98 and 99 of the Act. The question whether Hafiz Sri Mohammad Ibrahim has become disqualified as a result of the finding of the Tribunal will arise after the Tribunal's finding has been arrived at. That will be the stage when a reference may become necessary to the Governor. To say that the Tribunal should refer the question of disqualification to the Governor at this very stage without considering the question whether a major corrupt practice has been committed by Hafiz Sri Mohammad Ibrahim or not is, therefore, really putting the cart before the horse.

His second contention is that the Act is really complimentary to the Constitution and there is no conflict at all between its provisions and those of the Constitution. The Act has been framed in accordance with the Constitution. It is really not necessary to twist the provisions either of the Act or the Constitution to resolve an imaginary conflict between the two. If the two are read together and the entire scheme envisaged by them with reference to election matters is kept in consideration it will be found that the Election Tribunal is the only body which has jurisdiction to go into the question whether a major corrupt practice has been committed or not. No other body can go into the question or decide it. Act. 329 (a) of the Constitution contains a specific bar to any other body taking up the question or dealing with it. The Governor has therefore no jurisdiction to go into the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice or not. Even the Election Commission to which body the Tribunal owes its existence could not go into the question in view of Art 324 of the Constitution The Act is an exhaustive one. There is nothing in it on the basis of which it can be said that if a corrupt practice is alleged to have been committed by a sitting member of a Legislative Assembly, the question

cannot be dealt with by the Tribunal but should be referred to any other authority for decision. Under sec. 99 of the Act the Tribunal is bound to decide the question whether a major corrupt practice has been committed or not and to name the person who has committed it irrespective of his standing or status The Act or the Constitution do not contemplate two rival bodies for the decision of that question, nor do they contemplate that one of the bodies should wait for the decision of the other before dealing with the question. The Tribunal is an *ad hoc.* body which has only a temporary existence It must record its findings on all questions which are in dispute between the parties and on the decision of which the fate of the election petition entrusted to it for decision rests. The Tribunal would, therefore, be failing to do its duty enjoined by the legislature if it stays its hands at the present stage and refers to the Governor the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice or not.

His third contention is that if the method suggested by the learned counsels for the other side is accepted anomalies are likely to arise which the legislature could never have contemplated. The correct way of approach is therefore, to give the various provisions their natural meaning and to interpret them so that they do not conflict with each other at all.

We may state at the very outset that it was not seriously urged before us that any of the provisions of the Act were *ultra vires.* Every one appeared to be agreed about the constitutionality of its provisions. There is therefore no question of declaring sec 99 of the Act or any other provision of it to be invalid. In this view of the matter no question of making any reference to the Hon'ble High Court under sec. 113 of the C.P.C. can arise. It may however be mentioned that in the case of M. M. Manjuran *vs.* K. C. Abraham reported in 10 Election Law Reports 376 at pages 419 to 428 the view taken was that an Election Tribunal is not a court subordinate to the High Court as contemplated by sec. 113 C.P.C. and cannot make a reference to that Hon'ble Court under that provision even if it is of the view that a certain provision of law is *ultra vires.*

Now, in our opinion, there can be no escape from the position that this Tribunal is the only body which can go into the question whether a major corrupt practice has been committed in connection with the election of the respondent No 1 or not. This question undoubtedly relates to the election and without deciding it, it will not be possible for us to decide the election petition which has been entrusted to us for disposal. Under sec 99 of the Act as an allegation of a corrupt practice has been made the Tribunal has to record a finding whether a corrupt practice has been committed by or with the connivance of any candidate or his agent at the election. That alone will not be enough. It has to go into the wider question whether any corrupt or illegal practice has been committed by any person at all and to name all persons who have been proved before it to have been guilty of illegal or corrupt practice. In respect of each such person the Tribunal has to mention the future of the corrupt practice committed by him The words of sec 99 (i) (ii) of the Act are wide enough to include every person found to have been guilty of a corrupt practice. No exception has been provided in respect of any sitting member of a State or Central Legislature Had it been the intention to exclude such persons from the purview of section 99 the section would have been differently worded It would in that case have been provided that if the corrupt or illegal practice was alleged to have been committed by a sitting member of a legislature which could involve his disqualification, the matter should be referred to the Governor and should not be taken up by the Tribunal itself. Before parting with the election petition this Tribunal must carry out the duty enjoined upon it by sections 98 and 99 of the Act and if it fails to go into the question whether the corrupt practice has been committed or not or to name the persons who are proved to have committed it it will be omitting to perform the duty which has been imposed upon it by law. It will to that extent be abdicating its functions for which there is apparently no justification. It is therefore not possible for us to accept the contention of Sir Iqbal Ahmad that we have no jurisdiction at all to go into the question whether a major corrupt practice has been committed by Hafiz Sri Mohammad Ibrahim or not or to record any finding in that respect.

We are equally convinced that if in the case of a sitting member of a State Legislature the question arises whether he has become subject to any of the disqualifications mentioned in Art 191, of the Constitution it must be referred to the Governor and he alone has the jurisdiction to decide the question though he is bound to decide the question in accordance with the advice of the Election Commission which body he has to consult. The provisions of article 192 appear to be clear and mandatory. They confer exclusive jurisdiction on the Governor in respect of the question. No other person or body can, therefore deal with it. An analysis of Art 192 (1) will however show that the only question in respect of which exclusive jurisdiction has been conferred on the Governor is the question whether

(a) a sitting member of a legislature,

(b) has become subject to

(c) one of the disqualifications mentioned in Art 191 (1) of the Constitution.

It is only when such a question arises that a reference has to be made to the Governor and his decision on the question has to be accepted as final As shall be shown presently that question has not yet arien

In our opinion there is really no conflict at all between the provisions of the Constitution and the provisions of the Act and particularly between Art 192 of the former and sections 98 and 99 of the latter The Act appears to have been drafted keeping in view the provisions of the Constitution and is in fact complimentary to it If Art 192 of the Constitution and sections 98 and 99 of the Act are properly understood and appreciated, it will be found that they do not involve any conflicting loyalties and there is really no question of preferring the one to the other Sections 98 and 99 of the Act deal with one stage of the matter while Art 192(1) of the Constitution comes into operation at a subsequent wage If an election is questioned solely on *inter alia* on the ground of major corrupt practices or illegalities having been committed the questions whether such corrupt practices or illegalities have been committed or not and if they have been committed by whom they were committed must naturally be considered by the Election Tribunal to which the election petition is entrusted for disposal The Election Tribunal must record a finding whether any such corrupt practices have been committed and is also bound to name the persons by whom they were committed Without recording that finding it is not possible for it to dispose of the election petition or to pass any final orders in respect of it Section 99 of the Act therefore requires that before finally disposing of an election petition the Tribunal must record a finding about the illegalities or corrupt practices having been committed and must name the persons who are proved to have committed them In going into the question and in recording a finding, therefore, the Tribunal acts within its jurisdiction and does not encroach on the jurisdiction of any other authority

After the findings of the Election Tribunal have been recorded certain consequences must follow If the Tribunal comes to the conclusion that no corrupt or illegal practices have been committed there will be an end of the matter in that respect That ground of challenging the election will fail and it will not be necessary to name any one as having committed any corrupt or illegal practice If on the contrary the Election Tribunal comes to the conclusion that corrupt or illegal practices have been committed, it will first have to decide whether they have been committed by or with the connivance of any candidate or his agent or by any one else The persons who are proved to have committed the, corrupt or illegal practices will have to be named and the nature of the practice recorded The persons so named shall be disqualified for voting at any election for the period mentioned in sections 141 to 143 of the Act, but it will be open to the Election Tribunal to recommend an exemption of such persons from the disqualification which they will have incurred The person who is found to have committed a corrupt or illegal practice under Sec 99 of the Act may however happen to be a sitting member of a legislature In that case a question may arise as to whether on account of the finding of the Tribunal about his having committed a corrupt or illegal practice he has become disqualified for remaining a member of the legislature If such a question arises it will have to be referred to the Governor under Art 192 of the Constitution and the Governor alone can finally decide that question Art 192 of the Constitution can, therefore, come into play after a finding about the commission of corrupt or illegal practice has been recorded by the Tribunal The question whether on account of that finding the sitting member of the legislature has become disqualified or not cannot arise till the finding has been recorded Sec 99 of the Act must therefore be followed upto the stage of recording the finding Art 192 of the Constitution has to be followed after the finding has been recorded The two provisions thus relate to different stage and there is no conflict or inconsistency, between them at all

It is therefore not correct to say that there is a conflict between sec 99 of the Act and Art 192 of the Constitution and that the only way in which the two provisions can be reconciled is that at this very stage this Tribunal must refer to the Governor the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice and has on that account become disqualified for remaining a sitting member of the legislature and await for his decision before proceeding further If this Tribunal comes to the conclusion that no major corrupt practice has been committed at all or that at least Hafiz Sri Mohammad Ibrahim has not committed any major corrupt practice, it will record a finding to that effect and discharge the notice that has been issued to him under sec 99 of the Act In that case there would be no question of naming him No question of his becoming subject to any disqualification mentioned in Art 191(1) of the Constitution will arise in those circumstances and there will be no occasion for any reference being made by anybody to the Governor under Art 192 of the Constitution The question referred to in that Article will arise only after a finding on the point has been recorded by the Tribunal against Hafiz Sri Mohammad Ibrahim and if it does arise, the Governor may have to decide it

It was however urged strenuously that the question whether Hafiz Sri Mohammad Ibrahim had committed a major corrupt practice was inextricably interlinked with the

question whether he had become disqualified on account of having committed that practice for remaining a sitting member of the U.P. Legislature and if the latter question could be decided only by the Governor, the former question must also be referred to the Governor and he alone can decide it. It was further urged that the finding about a sitting member having committed a major corrupt practice automatically led to his disqualification from remaining a sitting member of the legislature. As soon as the finding was recorded he stood disqualified and his seat in the legislature became vacant. This was clear from the opening sentences of Art. 191 of the Constitution, Art., 190 (3) of it, and the opening sentence of sec. 7 of the Act. As soon as the finding about Hafiz Sri Mohammad Ibrahim having committed a major corrupt practice was recorded, therefore, the mischief will have been done and much use will not be left for making a reference to the Governor. It was all urged that the present was the only stage at which the reference could be made to the Governor. No other stage would come for that purpose.

In connection with the third contention above mentioned it was urged by Ch. Niamatullah, counsel for Sri Sri Krishna that the reference to the Governor should have been made much earlier. It should have been made as soon as it was alleged in the election petition that Hafiz Sri Mohammad Ibrahim had committed a major corrupt practice as defined in sec. 123 (8) of the Act.

Both Chaudhri Niamatullah and Sri Kanhaiya Lal Misra urged that after making a reference to the Governor this Tribunal must wait for his decision. After that decision has been made, according to Ch. Niamatullah, the finding of the Governor on the question of major corrupt practice having been committed, must be accepted by this Tribunal and dittoed by it. Sri Kanhaiya Lal Misra however conceded that even after receiving that finding though the decision of the Governor will be final and binding on the question of a disqualification having been incurred, it will be open to the Tribunal to record its own finding on the question of a major corrupt practice having been committed.

In our opinion if these arguments are closely examined it will be found that they cannot bear scrutiny.

We think the two questions, whether a major corrupt practice or illegality has been committed and whether any disqualification has been incurred or not, are two independent and distinct questions. Recording a finding that a corrupt practice of a particular nature has been committed by a particular person is one thing and the question whether on account of that finding the person concerned has become disqualified for continuing to remain a member of the legislature is quite a different thing. The difference between the two appears to be the same as between cause and effect and it should not be easy to make a confusion between them. This Tribunal is concerned only with the question whether a corrupt practice has been committed at all and if it has been committed what is its nature and who has committed it. We have no concern with the consequence which the finding will lead to. The argument that the question whether a disqualification has been incurred cannot be considered apart from the question whether a major corrupt practice has been committed and the two questions must be considered to gether also appears to ignore the express words of clause (a) of section 7 of the Act. According to that clause the disqualification can come into existence only after a finding has been recorded that a corrupt or illegal practice or one of the offences mentioned in sections 139 or section 140 of the Act has been committed. Without that finding being there no question of disqualification can arise. The finding must therefore be recorded first. The question whether a disqualification has resulted from the finding can arise only after the finding has been recorded. It must also be borne in mind that the only question which can be referred to the Governor under Art. 192 of the Constitution is the question whether a sitting member has become subject to one of the disqualifications mentioned in Art. 191 of the Constitution. His jurisdiction is confined to that question. No other question need be referred to him. He is not empowered to decide any other question. The question whether a corrupt practice has been committed or not is certainly not identical with the question whether a disqualification has been incurred on that account or not. There is therefore nothing either in the Act or in the Constitution which can justify a reference to the Governor of the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice as is alleged by the petitioner.

We shall assume without deciding that the contention is correct that the finding that a major corrupt practice has been committed by a sitting member of the legislature automatically leads to his disqualification and on that disqualification being incurred his seat becomes vacant in the legislature and a bye-election is required to be held for filling it again. We however think that this cannot be made a basis for the argument that the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice should not be decided by this Tribunal but should be referred to the Governor for his decision. Let us see in this connection what the Governor has to decide under Art. 192 of the Constitution. The only thing which he can decide under that provision is whether a member of the house or legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Art. 191 of the Constitution. Due notice is to

be taken of the tense of the verb "has become" used in the Article It is the present perfect tense denoting that the act in question has happened in the recent past From this it follows that the only thing which the Governor can decide is whether the member concerned has already incurred the disqualification of which he is accused The Article does not empower the Governor to decide whether the member is likely to become subject to the disqualification in question The Article presupposes that disqualifications as having been incurred and the only question which the Governor has to deal with is whether it has in fact been incurred or not That the disqualification will result automatically from the finding that a major corrupt practice has been committed is therefore not very material In every case of disqualification which is referred to the Governor under Art 192 of the Constitution, the disqualification must have been incurred before the question is referred to him With reference to the various sub clauses of clause (1) of Art 191 of the Constitution, when the question is referred to him under Art 192 of the Constitution, the Governor is to address himself to different issues Thus if the question is whether the member concerned has become disqualified under sub clause (a) of Art 191 of the Constitution, the Governor will have to consider whether the member concerned holds any office, whether it is an office of profit, whether it is an office under the Government of India or under the Government of any State specified in the First Schedule and if it is such an office whether the legislature of the State has by law declared it to be an office which shall not disqualify its holder If all these things are present the Governor will declare that the member stands disqualified, and if any of the ingredients are absent he will declare the contrary If the matter arises under sub clause (b), the Governor will have to decide at first whether the person concerned is of unsound mind He will also have to consider whether he has been so declared by a competent court If both these matters are established the decision will go against the sitting member If not, it will go in his favour The only thing which the Governor can consider in a case relating to sub clause (c) is whether the member concerned has been declared an insolvent and whether he is still undischarged In a case relating to sub clause (d) the questions to be taken up are whether the member concerned is not a citizen of India or whether he has voluntarily acquired the citizenship of a foreign State or is under any acknowledgement of allegiance or adherence to a foreign State In a case relating to sub clause (e), the Governor will have to refer to the law creating the disqualification and consider whether the essentials of that provision have been established or not In the present case the law made by the Parliament is to be found in section 7 (a) of the Act and under that section a disqualification is incurred when a conviction has been recorded in respect of any offence mentioned in section 139 of the Act or if the person concerned has been found guilty of any corrupt or illegal practice mentioned in section 140 in proceedings for questioning the validity or regularity of an election Therefore if the disqualification is alleged to be based on a conviction what will be seen will be whether the conviction has been recorded by a competent court in respect of an offence mentioned in sections 139 or 140 of the Act entailing a disqualification and whether the period mentioned in the section has elapsed If the disqualification is said to be based on a finding about a corrupt and illegal practice having been committed, the only things which will be considered will be whether the finding has been recorded that a corrupt or illegal practice entailing disqualification according to sections 139 and 140 has been committed, whether the finding has been recorded in proceedings for questioning the validity or illegality of an election and whether the period mentioned in section 139 and section 140 has elapsed If the finding is there, if it has been recorded in proper proceedings and if the period has not elapsed, the member will be declared disqualified If any of these ingredients is missing the decision will be otherwise The conviction for an offence mentioned in sections 139 and 140 of the Act or a finding that an illegal or corrupt practice mentioned in those sections has been committed therefore constitutes the basis of the disqualification The main thing which the Governor has to see is whether such a finding or the conviction is there To us it does not appear to have been contemplated by Art 192 of the Constitution that the Governor should not only decide the question whether on account of any finding or conviction the member concerned has become disqualified but should also record the finding or conviction himself and then decide whether on account of it the member stands disqualified The finding or conviction must be recorded by some other body The Governor can only decide whether a disqualification has resulted on account of that conviction or finding

There is therefore no question of a reference being made by this Tribunal at this stage or at any other stage to the Governor for the decision of the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice in connection with the bye election in question or not We think the question contemplated by Art 192 of the Constitution has not yet arisen and cannot arise till our finding under section 99 of the Act has been recorded Ch Niamatullah therefore, in our opinion really went too far when he urged that the reference to the Governor should have been made as soon as the allegation about Hafiz Sri Mohammad Ibrahim having committed a major corrupt practice was made in the election petition The question of disqualification cannot in our view be deemed to have arisen simply because of such an allegation having been made The allegation could at any time be withdrawn and could also be disproved at the trial of the petition The question of disqualification can therefore arise only when

a finding that a major corrupt practice has been committed by a sitting member has been recorded. This Tribunal must therefore record a finding on the point. After recording that finding and giving its decision in compliance with sections 98 and 99 of the Act this Tribunal will cease to function. It will therefore not be concerned with the consequence which its finding or decision will lead to. We find it difficult to accept the contention that instead of deciding the question ourselves we must refer the matter to the Governor and accept his decision and made it our own. If the law requires us to go into the question and record a finding in respect of it, the finding must be the result of our own *independent judgment. The finding to be recorded under section 99 (a) (i) is expected to* be the finding of the Tribunal and not of any other body. The persons who are to be named by the Tribunal under section 99 (a) (ii) of the Act are the persons who have been proved at the trial (before the Tribunal) to have been guilty of any corrupt or illegal practices. The decision about their guilt must therefore be the decision of the Tribunal and not of any other authority.

If we are to act according to the suggestion of Ch. Niamatullah or Sri Kanhaiya Lal Misra, refer the matter to the Governor and on receipt of his decision record a finding either in accordance with his decision or against it, a serious anomaly may arise. If we accept the decision of the Governor and decide the matter according to it, the decision on the question will not be our own. We will only be adopting the decision of an authority which is not in the picture at all under the Act. If on the contrary the Governor holds that no corrupt practice has been committed and so no disqualification has been incurred and we some how happen to arrive at a contrary conclusion that a major corrupt practice has in fact been committed by Hafiz Sri Mohammad Ibrahim, the decision of the Governor on the question of disqualification may be entirely nullified, for in that case the Governor's decision about disqualification will have been arrived at before the recording of the finding of the Tribunal about the commission of a major corrupt practice though under section 7 (a) of the Act it is the finding of the Tribunal which must be the basis of the disqualification.

There is yet another reason why we cannot accept the contention that because the Governor has exclusive jurisdiction to decide whether a disqualification has been incurred, he has also exclusive jurisdiction to decide whether any of the events which entail such disqualification has come into existence. If this contention is accepted it will lead to startling results which the legislature could never have intended and if it intended those *results, it is surprising that no specific provisions were made about them.* It has already been shown under section 7 (a) of the Act that the finding about a corrupt or illegal practice mentioned in section 140 having been committed and the finding that an offence under section 189 of the Act has been committed have been placed on the same footing and both make the person concerned ineligible for being chosen as or for being a member of the legislature. In the normal course under the provisions of the Code of Criminal Procedure the offences mentioned in section 139 of the Act are to be tried by a Magistrate who has to record the conviction and pass the sentence. According to section 139 of the Act the conviction entails disqualification for membership of Parliament and of the Legislature of every State. If along with the question of disqualification the question whether an offence leading to that disqualification has been committed or not is also to be referred to the Governor, the Magistrate will have no jurisdiction to try the case when it is referred to him and will have to stay his hands till both the questions are decided by the Governor. Had that been the intention of the legislature, it would have made some clear provision either in the Act itself or in the Criminal Procedure Code laying down that offences mentioned in section 139 of the Act if alleged to have been committed by a sitting member of the legislature shall not be tried by Magistrates in the usual course but shall be referred be them to the Governor for decision under Article 192 of the Constitution. Under clause (b) of section 7 of the Act a conviction for an offence and the sentence of transportation or imprisonment for not less than two years also entails a disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State. This disqualification remains in force for five years unless the period is curtailed by the Election Commission. If the person involved is a sitting member of the legislature and the question of his disqualification is inextricably connected with the question whether he has committed the offence referred to in clause (b) of section 7 of the Act and both are to be referred to the Governor under Art. 192 of the Constitution, the Governor will be the authority to decide whether the member concerned has committed the offence for which he is to be punished with transportation or imprisonment for more than two years. If this interpretation is to be accepted the position of the Governor at least so far as an offence committed by a sitting member of the legislature is concerned, is reduced to that of an ordinary Magistrate. This in our view could not have been intended by the legislature.

On giving our best consideration to the matter, therefore, we have unanimously and without hesitation come to the conclusion that this Tribunal is the only body which has exclusive jurisdiction to consider the question whether a major corrupt practice has been committed by Hafiz Sri Mohammad Ibrahim as alleged and to record a finding on the

question under section 99 of the Act. There appears to be nothing in the Act or the Constitution to require a reference by this Tribunal to the Governor for the decision of that question; nor is it correct to say that this Tribunal should await the decision of the Governor on the question of disqualification and then proceed with the petition. This Tribunal is an *ad hoc* body and has only a temporary existence. It must record findings on all the questions which arise in the election petition referred to it for disposal and will be abdicating its function if it does not comply with the requirements of section 99 of the Act. The Tribunal will therefore be failing to do its duty if it stays its hands at the present stage and refers to the Governor the question whether Hafiz Sri Mohammad Ibrahim has committed a major corrupt practice or not. This question cannot be decided by any other body and can be decided by this Tribunal alone. The point of jurisdiction which has been raised on behalf of Hafiz Sri Mohammad Ibrahim and which has been supported by the learned counsel for the respondent No. 1, Sm. Shivrajwati Nehru and for Sri Sri Krishna is, therefore, in our opinion entirely without force and must be rejected. It is ordered accordingly.

The case must now proceed from the stage at which it was stopped. Let 29-9-56 be fixed for further evidence on behalf of Hafiz Sri Mohammad Ibrahim.

KRISHNA CHANDRA SRIVASTAVA,
Member, Election Tribunal, Lucknow.
The 20th September 1956.

AMBIKA PRASAD SRIVASTAVA,
Chairman, Election Tribunal, Lucknow.

S. N. ROY, Member,
Election Tribunal, Lucknow.
The 20th September, 1956.

[No. 82/2/55.]

By Order,
DIN DAYAL, Under Secy.

PRINTED IN INDIA BY THE GENERAL MANAGER, GOVT. OF INDIA PRESS,
NEW DELHI AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1958